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at Harvard. At the same time he was appointed as a special assistant to Secretary of Health, Education and Welfare Robert Finch. For the next fifteen months, Professor Fessler divided his time between Cambridge and Washington. He authored a thesis in which he speculated as to whether government entitlement benefits should be classed as "property" so as to afford a citizen due process rights when those benefits are revoked and reduced.

In 1971, with his period of residence completed at Harvard, Fessler accepted the invitation from the University of California to join the law faculty on the Davis Campus. In 1973 Harvard conferred upon him an earned doctorate degree in jurisprudence, perhaps the rarest degree in American higher education. There would not be fifty living persons ever to attain such a distinction. In that same year he was made a full professor at the University of California completing the requirements for tenure in record time.

Since 1973 Professor Fessler has served as a visiting professor of law at the University of Virginia (1975-76); the University of Texas at Austin (1978), and the University of California at Los Angeles (1983). In 1982 he was named the William and Sally Rutter Distinguished Professor of Law.

Throughout his academic career Professor Fessler has taught contracts, business organizations, security regulation and other related business courses. At the age of forty-two he is the author of two major casebooks, one dealing with contracts and the other with alternatives to incorporation. The latter book has been used in more than thirty American law schools.

Professor Fessler first came into contact with Alaska through his efforts to place recent graduates of his law school in clerkship positions with the Alaska Supreme Court. Few efforts could have been more successful. Today more than twenty of his former students have served that court and our court of appeals. Most have remained in Alaska where they occupy positions ranging from federal and state government to the private practice.

In 1978 he came to the attention of the Legislature when the House State Affairs Committee sought his assessment of the Government Stock Ownership Corporation Bill then pending. Members who dealt with him on that subject recommended his appointment as consultant to the Commission at the time when we were entertaining thought of revising the content of Title 10 of the Revised Statutes. In the four years since we retained his services we have met repeatedly with Professor Fessler. Suffice it to say that we have found him to be the gracious, scholarly, and patient individual praised in Mr. Reitman's letter of March 12. His views have been sought and taken into account as the members of the Commission have framed the value judgments which are now pending before this Committee. Reitman is plainly wrong in termining the work of nearly a dozen Alaskans as the "Fessler Code". Such a misdirected charge reveals that Mr. Reitman not only does not know Professor Fessler, but he is also ignorant of the dedication of the members of this Commission who have labored for four years without compensation to bring their experience and collective wisdom to bear upon a better statutory foundation for

incorporated enterprise in our state. It is time we moved forward with that important business.

SUBCOMMITTEE HEARING OF SENATE JUDICIARY ON
CSSB 246/HB 343--FOR PROFIT CORPORATIONS CODE
ANCHORAGE, ALASKA - APRIL 28, 1984

JOSEPHSON: This is a subcomittee meeting of the Senate Judiciary Committee on CSSB 246. And I will say that I have in a packet a memorandum from Mr. Regan of the code revision commission of March 5th, correspondence from Mr. Reitman attaching a report of the task force of the Business Law Section of the Alaska Bar Association. That letter dated March 30 and the report is dated March 30 as well. We have other correspondence from Mr. Reitman including a letter of March 12. We have a report from the code revision commission regarding limited liability under HB 343 and various materials, memorandum from Daniel Fessler dated March 14 which attempted to answer questions raised by Rex Butler of my staff. A memorandum and enclosures regarding this subject was sent to me on January 18 by Mr. Dick Regan, and various other materials. This is not to say that I have personally digested them, but Mr. Butler of my staff has. And I've had conversations with various of you. Is Mr. Fessler here now?

FESSLER: Yes.

JOSEPHSON: Professor Fessler, would you like to come forward then.

FESSLER: I think that Mr. Abbott, the chairman of the commission, should speak first.

ABBOTT: I have an opening statement which I am going to read into the record, Senator Josephson, and I'll make a copy of that available to you and that will probably put the matter into prospective.

JOSEPHSON: I should also say I was requested to have a hearing in Anchorage and ordinarily on bar issues, unless they involve personal injuries and products liability, there is usually a very broad concensus of opinion and here we have, if we proceed to find two strenuously different points of view, it seems to me we should give both sides an opportunity not only to review the bill but then to give testimony in Anchorage. And that is why we are here. John, if you'd like to start.

ABBOTT: Thank you Senator. NOTE: JOHN ABBOTT'S TESTIMONY IS APPENDED TO THIS TRANSCRIPT.

JOSEPHSON: Thank you. Mr. Reitman, do you wish to . .

KELLY: I'd like to say one . . . preceding to that. I think Mr. Abbott's comments . . .

JOSEPHSON: Would you begin by identifying yourself . .

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KELLY: Late of the Business Law Section of the Executive Director. And I think Mr. Abbott's comments are a personal attack on the integrity of the ten members of the group who involved themselves without pay and a lot of time that they invested. And I think it was a juvenile statement, I'll have to say that that's the last personal attack I'm going to make on him, I mean Mr. Abbott. Excuse me, I'm just a little bit upset myself. It was a juvenile statement on his part. Mr. Abbott, just to sit down and attack each member of the group any one of whom o_ most of whom I think have had quite a lot more experience than he has.

JOSEPHSON: Let's set some ground rules because I'd like to hopefully complete hearing testimony by 11:00 a.m. It's Easter weekend and I think that should be an adequate time. And I have afternoon constituent meetings ahead of me. And by the way, if any of you are in my district, you are welcome to come back and talk to me again. Let's try as an agreement of ladies and gentlemen to try to use the next remaining part of our time for as much illumination of the merits from a public policy standpoint as we can and shed light on . . .

KELLY: I'll agree to that.

JOSEPHSON: Because what I want to do is be able to understand and convey to other legislators where the deficiencies of existing are, whether they are in dispute, where the statute we have may be improved, what the remedies are, what the merits and demerits of the proposed bill are. Frankly, there are I think three or four attorneys in the Senate. And I find and Senator Rodey finds and Senator Pettyjohn and Senator Ziegler find that the sixteen lay persons in the Senate could care less about intramural arguments among lawyers. And moreover, even if they could care I really hate to shed all that out in the Senate eye because of professional implications. So I would like to talk about the merits of the bill.

KURTZ: I think we would, too, Mr. Kelly.

KELLY: Yes, I would. But I'm deeply concerned about the tremendous misrepresentations that were just presented . . .

JOSEPHSON: Well, when I hear from . . .

KELLY: A written statement that's been made a part of

the record.

JOSEPHSON: If you want opportunity to speak to that, you're welcome to do that. What I gather is that there are, all I derive from it, frankly, is that there are a lot of feelings and that Dr. Fessler is a very reputable expert. That's about what I . . .

KELLY: That's not what I heard. I heard Mr. Abbott slander certain members of the bar association just now. And I think that that thing should be pulled from the record that he just submitted to you so that we can deal with the merits of the bill that's before this group today. And secondly, I was concerned because we tried to establish the format that was going to take place, that was going to govern the hearing today. And it was our knowledge, we were told that it was not going to be a formal hearing. And that was my concern because our past meetings with Mr. Abbott this has been typical. These personal attacks. And that is why we've been unable to reach a resolution.

JOSEPHSON: Thank you, Mr. Kelly. But I will assure you I'm not going to pull things out of the tapes. I don't think that's permitted. But what I will do is in my report which you will have a copy of I will address my perceptions of the merits and demerits of the legislative proposition. And I will confine my report to that. I'm not, for the reasons I've stated, am not going to indulge the Senate in personalities and arguments and counterarguments. If you want to tell me for my edification, that's fine. But I'm not going to put that into the dialogue with the senators.

KELLY: Well, O.K., I'm concerned about that document that he filed, the written statement and the slander it contains. It's neither here nor there at this point. I guess I'm going to just turn it over to Mr. Reitman. I guess he does have to respond to some of this. And I don't know if you did receive a letter yet. But Chugach Native Association was supposed to submit a response to your office today, I think.

JOSEPHSON: Chugach Native Inc. or Chugach Native . . .

KELLY: Native Inc. Or Native Association. Their attorney had called me because he was quite concerned about this bill.

JOSEPHSON: Was that Mr. Norman? O.K. I received something . . .

KELLY: O.K. And I just received from Mr. Norman's office this morning a copy of the letter that he has forwarded or

is forwarding to your office.

JOSEPHSON: I have a copy.

KELLY: O.K.

JOSEPHSON: Has the Anchorage Bar or the Alaska Bar by any type of meeting or voting process either endorsed or opposed this legislation?

KELLY: No. We never . . . There's never been any stand taken by the Alaska Bar, and there's never been any stand taken by the Anchorage Bar. And I think that's been clarified since the beginning that this is a task group made up of Business Law Section members of the Alaska Bar Association.

JOSEPHSON: O.K. This letter is from John Norman, member of Business Law Section, Alaska Bar Association, researching rejection of CSSB 246 during this session on the basis of insufficient public scrutiny and a lack of awareness in the business community. Expressing the view that any deficiencies in the UCC act can be corrected more easily and economically by adoption of relevant provisions in the current revised edition of the model business corporation act.

KELLY: Thank you. And rather than take up any more time, I don't see where, this is typical. The discussion is going to be difficult to make this morning, I think, because it's been set off on an improper tone. And I frankly don't know what I can contribute any more to this meeting. It sounds like a, we open up with the, a significant. Significant members of the bar, Mr. Norman, Mr. Reitman, other members of this task group whom I think are some of the top business lawyers. Mr. Brundin, who is one to be affected by this legislation. Mr. Eggers. Their integrity was attacked, and I don't know what we can do to contribute at this point. I'll leave it up to them to provide a response. Thank you.

JOSEPHSON: Mr. Reitman, do you want to comment?

REITMAN: I think I'll let the opponent speak . . .

JOSEPHSON: All right. Do you wish to come forward now, either Mr. Kurtz or Dr. Fessler.

KURTZ: Thank you, Senator Josephson. My name is L.S. Kurtz, Jr. Probably nobody knows but I'm usually known as Jerry Kurtz. I'm here on behalf of the code revision commission urging consideration and passage of the bill. I am a member of the Alaska Bar Association and the Business Law Committee of the Alaska Bar Association as well as the code revision commission.

I will be very brief in my comments regarding the mud throwing that has occurred in connection with this bill. But I will say two things. First of all, I agree generally with what John Abbott said. Secondly, the code revision commission did not start that, and I think that's enough on that point.

I think that there are a number of areas of the proposed bill where attorneys will take many different views. Any time you're representing the bar association of several thousand attorneys on a bill of this complexity, you're in a hot seat. And I'm there; that doesn't bother me particularly. But I knew I was going to be in that hot seat when we started working on this bill. And as a result I made extraordinary efforts to bring not only commission members and the bill, but Dr. Fessler to the bar association trying to give the bar overall some indication of what was happening. And while Richard Block has alleged surprise at times, I don't think Stan Reitman ever has. And I think the other members of the committee have been relatively fair about agreeing that the bill was brought to the attention of the bar as early as 1982. And the bar did not respond as quickly as it should, which is I think typical of most attorneys. The only reason I bring this up is that it's important in guaging how the bar feels about the bill.

In 1982 at the convention of the bar which, I emphasize, was held in Anchorage where most of the attorneys are. A business law section seminar was devoted to this bill. And after that seminar I eagerly awaited response from attorneys. And I was still waiting when this ad hoc committee of the Business Law Section was formed a month or so ago. I did get calls from a number of attorneys concerning sec. 488, the limited liability section. And I think it's very safe to say that I could not appear saying that the bar was for that section or against it. It's a controversial section; it stands alone in the bill. I don't think it makes any difference what the legislature does with that particular section. And in terms of considering the merits of the bill, that section should be set aside and considered by itself, in my opinion. And that's the position I've taken with the bar all along.

JOSEPHSON: Do you mean that the committee could excise that section and proceed with the rest of the bill as far as you're concerned?

KURTZ: It would be just fine as far as I'm concerned.

JOSEPHSON: And have that stand on its own merits . . .

KURTZ: Or the committee could look at that section and decide what to do with it and whether it goes in the bill or stays out of the bill. The rest of the bill is not affected by

it. And I think that's very important because . . .

JOSEPHSON: It's severable from the rest of the . . .

KURTZ: It's very severable, and there's nothing else in the bill that ties in with it. Another thing that's important is the legislature. I think the attorney members, particularly the Senate Judiciary Committee, has had a lot of experience with model acts over the years and uniform acts. And one of the things the code revision commission is particularly charged with doing is looking at uniform acts and model acts and determining whether they should be enacted in Alaska. Some of these acts aren't very good. And some of them that we've adopted haven't been too good. I think in 1952 the Model Corporations Act was probably a good thing for Alaska and maybe even in 1960 or 64. It's been outrun by the economic development in this state completely.

JOSEPHSON: O.K., Jerry, let me just stop you there, if you don't mind. I used to be taught that there was one advantage in the uniformity in the commercial area which was the facility with which a corporation could move from state to state without getting the jolt of different legal principles. Do you see that as an issue here in terms of companies considering economic development in Alaska that we would want to have come into our state?

KURTZ: I see it as a very minor issue and I'm glad you asked that question because I would have gotten there probably in four minutes. And this way we'll save four minutes. The first problem is that the existing model act has been substantially adopted in only twenty states. There are another ten states that have adopted portions of it. My source of that information is a text that's probably most widely used by Alaska attorneys, the West Ocean Company. Four volumes originally and now five or six editions on the Model Corporation Act which I suspect that most of the attorneys here have in their office.

The major commercial states by and large and particularly New York and California have never adopted the model act. Now that's the existing model act. It's very interesting, the National Conference on Uniform Laws puts out a list of record of passage of uniform and model acts. It covers all the uniform acts, all the model acts. And the Model Corporations Act, what I'll call the old one, which is what we have, is not even on that list. I'm not quite sure why, but I think it's because it was put together by the Business Law Section of the American Bar and was never comletely endorsed by the American Bar Association. So when we talk about uniformity, we don't have it now. More important, we don't have uniformity with the major commercial states.

Now investment money in this state by and large is coming from New York, from California, a lot of it from Texas. And New York has never had the model act, still hasn't. California not only hasn't had the model act, it's taken a very hard look at the state of its corporations code within the last ten years and passed a completely new code.

On the other hand, no one has adopted the new model act because it's not yet even in final form. It may be adopted by a number of states over the years, but on the basis of experience with the last act I don't think it's going to be adopted by the major commercial states. The only thing that's important to notice if it is, the bill you have before you includes a great number of provisions drawn from the new model act. And it includes a number that are the result of looking at the new model act and at the California and New York acts. Does that answer the question? My conclusion would be that it is not a uniformity issue.

JOSEPHSON: Usually when there are differences of opinion about legislation, you know they may be manifested in the personality issue or challenges of personal integrity, there is some underlying economic interest or consideration at stake. Can you tell me in your opinion if 246 were adopted let's say with sec. 488 for starters, in the field of people that I relate to, who are going to claim to be winners and losers? Talking about investors and consumers and creditors and debtors and regulators, who gains and loses here and what are the economic interests that are around?

KURTZ: That's a large, that question requires a large answer. I will try and give you a brief one, but feel free to stop because I'm sure I won't succeed in that goal. First of all, let's talk about large pubicly held corporations. In Alaska we only have one broadly held public corporation that I'm aware of, other than the Native corporations, and that's Alaska Airlines. Wien and Northern Consolidated used to be in that category. There may be one or two others that have a fair distribution of stock, but the only big board listed company certainly is Alaska Airlines. Alaska Airlines supports this bill.

JOSEPHSON: As a domestic Alaska corporation?

KURTZ: That's right. And Alaska Airlines attorneys have been looking at the bill for some time, and Irv Bertram has appeared for the code revision commission. He's also appeared I think it was before the House Commerce Committee, the hearing, supporting the bill. As he is the assistant general counsel of Alaska Airlines and the person that's worked with the bill. A

number of the Native corporations also support the bill. These corporations are looking ahead not very many years, I think it's 1990, at a time when their stock will be inalienable. It will be bought and sold by anyone.

JOSEPHSON: 1991.

KURTZ: 1991. And both Alaska Airlines and the Native [illegible]ations are operating in a world which most attorneys in [illegible] have never operated in. They are going to be dealing with [illegible]rge numbers of shareholders, with . . .

JOSEPHSON: Takeover problems?

KURTZ: Takeover problems, with more and more derivative suits. All the problems that large corporations in the south 48 have. Our present legislation utterly fails to come to grips with most of those problems. Others it does give you something to work with, but one of the big advantages I see in revising the corporation code whether the bill under consideration now is adopted as is or some other bill is adopted is that it gives us an opportunity to help solve these problems or help deal with the problems before they get here in mass. Otherwise, we're going to have one of the most fertile litigation grounds in the early 1990's for corporation attorneys that's been seen for a long time in the United States given the propensity of Alaskans to litigate. We've seen a certain amount of this in shareholder's derivative suits already in this state.

Now turning to another aspect of it, that's the smaller corporation. The smaller business corporation or the close corporation, perhaps that's the best term to use, is going to have to do a little bit of work because of this bill. But on the other hand, maybe a lot better off in the long run because of this bill. If I were a shareholder in a close corporation, actually I am in a few, but looking at it as an attorney, I think that the long run benefits of the bill for close corporations are substantial for the shareholders and for the directors. On the other hand, for the person that's using the close corporation as a tool to avoid personal liability and to avoid being held accountable, the bill will be a bad bill. We've had many collapsible corporations in Alaska, and here I'm making these statements without regard to sec. 488. We've had many collapsible corporations in Alaska; we've had a lot of corporation fraud in Alaska. Alaska has a very mobile population. Our population turnover is much higher than it is in most states, and in this kind of an atmosphere it's much easier for somebody to come in, set up a corporation with no capitalization, play games with it for a while, make some money and run. It will be a lot tougher to do that under this new bill than it is under the old bill. And one of the big reasons is

there is more protection for shareholders, and there is more access to information regarding the structure of the corporation than there is in present law.

JOSEPHSON: Could you, or maybe Dr. Fessler when he testifies, refer me to the section that you think . . .

KURTZ: I'll never make it, I can guarantee that. I think Dr. Fessler probably could.

JOSEPHSON: What I want is the sectional references that relate to protection for people dealing with or investing in the small corporations.

KURTZ: Now, finally, and I am trying to keep this very brief. When you get to the question of 488, limited liability section, this ties in with what I just was talking about. The people, I do a lot of work with debtor and creditor law. And these days most of it's representing creditors, although some of it's still representing debtors. And the place where I see Alaska businessmen, people who lived in Alaska and worked in Alaska and have for a number of years, being hurt the most often is on trade receivables. Representing banks, which I do a great deal of, as does some of the other attorneys here, you see it from another standpoint. The bank loans money to businessmen on the strength of their receivables, and the receivables aren't collected and then the businessmen can't pay the bank. Trade receivables is a term generally used in the business world for thirty day accounts payable for paper, wood, cleaning supplies, whatever you have in the way of merchandise that's ordinarily sold in that manner. Section 488 is a section aimed primarily at that type of debt, and it does make directors personally liable and officers for . . . . I take that back. It makes officers personally liable for certain types of debt and particularly for trade receivables up to a certain amount per officer.

JOSEPHSON: You mean when they financed at a bank?

KURTZ: No, when it, let's assume you have the Ajax Contracting Company. And Ajax orders a bunch of wood from United Building Supply and doesn't pay for it. That's the sort of thing that I think those officers would be liable for . . .

JOSEPHSON: There is nothing to prevent United Building Supply under existing law from, when it sets up an account with Ajax, from requiring the individual officers to guarantee or cosign or otherwise indemnify is there?

KURTZ: No, there isn't. And indeed United Building Supply is a good example to use in contrast with Joe Doakes, the subcontractor or the little guy who runs a janitorial service.

If United Building Supply is sophisticated enough, large enough, it might well go after those personal guarantees it was worried about. The fellow that runs the janitorial service or whose cleaning up houses following a construction job doesn't have that kind of sophistication. And he's the one that invariably gets hurt. When a collapsible corporation goes under, the smart people that got their guarantees get paid. But they are the sophisticated ones, usually the large ones, usually the ones that can afford an attorney. Like one of the members of this ad hoc business law committee that's involved in that sort of thing. Or me. The ones that don't have attorneys get stuck, and I consider 488 a basic, philosophical issue as to whether you want to try to protect people who can't continually go to an attorney or not. And that's an issue for the legislature to decide. And the bar's split on it. There's no question about it.

JOSEPHSON: Well, now, does 488 represent a major break with century-old, Anglo-American tradition? How much of a pioneer, what pioneers here, how much of a pathfinder does this section, is this going to be. Or has someone else used a similar approach somewhere else?

KURTZ: Nobody has used exactly this approach. New York has used the approach regarding certain types of debt with directors, pardon me, with shareholders, which to me is weird. I would say, yes, we're blazing new ground with 488. And whether we should . . .

JOSEPHSON: I mean the argument, as I recall from my old law school days, was that the corporation was created to allow for an enactment of capital to meet the requirement in the industrial revolution.

KURTZ: That's the theory.

JOSEPHSON: And was an essential part of that economic development in England and in America . . . [TAPE CHANGE]

KURTZ: Two things that I can think of right off. One done by the Alaska legislature and one done by the Congress which go against that theory apparently for overriding social reasons. One, of course, is the Internal Revenue Code where if a corporation doesn't pay certain types of taxes, withholding taxes, the officers of that corporation responsible for payment are personally liable for it. A similar provision is in the Alaska Workmen's Compensation law where if a corporation does not carry workmen's compensation insurance, officers of the corporation are personally liable for paying not the insurance bill, for paying whatever compensation is due a worker who gets injured when he isn't covered by insurance. Now there may be others, but those are two limited changes from the traditional

law. And so there is no question ~~why~~ it can be done without killing business development, and it's a policy question as to whether it's worth protecting these little, very small business firms around town that can't afford ~~and~~ use legal assistance on a continuing basis. That's one for the legislature. I don't think that's a decision that should be made by the Alaska Bar Association or any subcommittee thereof.

JOSEPHSON: By the way, . . . testify, indicate what areas of common ground there are and you mentioned there are two. There are apparently more provisions as to which the code revision commission and the task force see eye to eye, and I'd like to have those identified also. Not necessarily by you, Jerry, but . . .

KURTZ: I would like to comment on one other provision, and then I'll cease and desist. There was some objection by members of the task, ad hoc committee, to the change in notice requirements from ten days to twenty days for notice of shareholders' meetings and several other things. And the commission thought that was a pretty important change. I don't know of another state that has the twenty day notice requirement. I don't know of another state that's fighting the geographical problems that Alaska is in terms of finding shareholders, finding directors and giving them notice of what's going on. Like most of the commission's decisions, that one wasn't made by Dr. Fessler. It was made by the commission after a lot of consideration at several meetings, and I would hope that the legislature, I'm sure the legislature will because people in the bush that realize this problem in addition to Native corporations who are very aware of it. The present law provides only ten days notice to shareholders and to directors and in many cases is just not enough to function in a state where people are separated, sometimes completely out of communication, and seem to spend a fair amount of time in the south 48.

JOSEPHSON: Are the time . . . waivable . . .

KURTZ: They are always waivable, yes. And with the close corporations are waivable, twenty days shouldn't create any problem. One final comment on your question are we in agreement on anything. I'm not sure. I think it depends which portion of the ad hoc committee look, I get the idea that most of the members of the ad hoc committee do like some portions of the bill, but are opposed to other portions. A substantial portion of the ad hoc committee just wants to spend more time looking at it. The feeling I get is that almost everybody agrees there should be some changes in the law, that we're dealing with an act that's outmoded.

Now Brian Brundin I don't think agrees with that. I'm

not sure what Stan Reitman thinks. But the impression I've had from the other members of the ad hoc committee and from the bar generally is that we need to take a look at this. And anybody that works with Native corporations strongly feels we not only need to take a look at it, we need to do something with it and well before 1991.

JOSEPHSON: And there was reference I thought to Mr._____ of Chugach Native has taken a different view than that . . .

KELLY: I spoke with him, I had to leave town Thursday, so I spoke with him Thursday morning, and he said he would have a letter to you and he did have authority from the board . . . at that time to issue a statement . . . Thank you.

KURTZ: There is one other thing I'd like to mention as far as attorney input on this goes. The Alaska Federation of Natives, we knew this would have a big impact on Native corporations, and we went to them a year, year and a half ago and went to the Alaska Federation of Natives and asked them to give us some help. They appointed a subcommittee of attorneys who work with Native corporations. We got an awful lot of helpful input from Ray Plummer, from Elizabeth Johnston, and from Mr. McNeill of the Sealaska Corporation, from someone else in Fairbanks, I can't remember who. And again I think in the area of broadly held public corporations, we desperately need more legislation. And we desperately need it before it becomes a political hot potato and the question of how the procedural aspects of corporations of that size should be handled gets lost in the political ramifications of whether various restrictions should be continued for Native corporations or whether Native corporations should have disparate treatment which we looked at very closely and concluded was probably unconstitutional. I will stop at this point. I can well imagine talk all day, and I think most of the other attorneys here can too. And I don't think that that would be fair given your time requirements. Unless you have any other questions.

JOSEPHSON: Appreciate your coming up to talk. Mr. Reitman.

REITMAN: My name is Stanley H. Reitman. I'm an attorney in Anchorage. I've lived and practiced in Anchorage since the early 1960's. And my work is primarily in the area of business law, some amount of tax and banking. I'd like to first request that when the transcript of this hearing has been prepared that the number of us on the task force group have an opportunity to respond on the record to Mr. Abbott's diatribe. I'd also like for me to hand you just for the purposes of the Judiciary Committee of the Senate a copy of the 1983 Revised Model Business

Corporation Act which is a product of the American Bar Association, American Bar Foundation and related groups.

I realize we're under some time constraints this morning, and I'll try to be as brief as I can. Let me just make some random observations because starting with the very latest one that Mr. Kurtz noted with respect to the AFN support. And he mentioned a year to a year and a half ago which was a time of contact with the AFN group or subcommittee. And that precedes, if you will, March, 1983 which is on the cover page of that document in front of you captioned 1983 Revised Model Business Corporation Act. At the time that, it's my understanding and, of course, is obviously second and third hand information, I wasn't a participant in any of those conversations. At that time this particular, this product was not available. And I had talked independently with three lawyers representing three different regional corporations of the developed Native regionals here in Alaska. I haven't contacted any more than three. But of the three, they were unanimousd in saying that their position was that they felt that this revised model business corporation act was a far better vehicle to utilize as a spring board for revising or dealing with the existing Alaska statute for a number of reasons. So I think when any illusion or any reference is made to the support of the AFN group, it should be noted very, very carefully as to when that support was given. And one of the things I got was that at that time the passage of this SB 246 of the code revision code or Fessler code as it's sometimes referred to appeared to be rather, fairly noncontroversial. And the Native groups were able to extract what they considered to be a number of tradeoffs as a condition for their support included among which was a specially carved out niche for the Native corporations, vis a vis, the section 488 which has generated so much controversy.

So . . . is just something that if you really want to rely on, you ought to check currently and not with a purported support that emminates a year and a half, over a year ago.

JOSEPHSON: Excuse me, there is a letter in the file from Jean Leask, AFN President, expressing support . . .

REITMAN: What date does that say?

JOSEPHSON: April 8, 1983.

REITMAN: My understanding is that was before this product was released. I did, I thought I had but maybe Mr. Abbott received his mail from a different locale, but I sent a number of communications to you, Senator, including a letter of March 12, 1984, a letter of March 30, 1984, and a third, another letter of March 30, '84, all of which to the best of my knowledge

was sent to Mr. Abbott as Chairman of the Alaska Code Revision Commission, Jerry Kurtz and Judge Stewart. The only reason I just sent to those three was because those were the three I had talked to. And I had not talked to any other members of the code revision commission. At any rate, they were copied.

I think a good point of departure and I hope that this correspondence of mine commencing with this March 12, 1984 letter can be made part of the record of this subcommittee hearing. In my March, in that initial letter, March 12th if you will, yes, I think I set out with some detail what my position is, was and still substantially is and I think this is and without reading any prepared statement here. As far as I'm concerned I think we want the best for Alaska. When I started to practice here in the early 60's, we had the Uniform Partnership Act and we had the Limited Partnership Act appended thereto. We were about to get the Uniform Commercial Code and we had this model corporation act which, characterizing as it is being borrowed from Oregon is misleading. What I found is that the model act was a very useful tool. Many practitioners here in Alaska, for example, in preparing articles of incorporation used to go through ten, fifteen pages of closely typed written material and charge the client a very handsome stipend for the work. And I recall all I had to do was pull this West Publishing book off the shelf and there I had basically articles of incorporation which track the statute. I had bylaws there, a model form of bylaws, very readily available. And we could either work with a modicum of effort and with a very reduced fee to the consumer. And it stood in good stead and as a form book and as bylaws. Now that model act was produced by some of the most prestigious, able practitioners and academicians in the nation. It wasn't just based on one academician or two or three or four practitioners, it was a diverse group with wide experience.

Over the years that model act was amended. There was a flurry of activity particularly in the last ten years going back to 1974. We didn't keep up with it, there's no question about it. I remember being the chairman of a business law committee, this predates Paul Kelly, and I'm sure a number of people in the room will remember our experiences. Either you called a committee meeting and you were lucky if you had one or two people show up. It was very difficult to engender any great amount of you know effort. The bar was delinquent. There is no question about it. But on the other hand, we were lucky because we had legislators who in the past had the wisdom to select what I thought was very useful tools. To repeat, the Uniform Commercial Code, the model act in the corporate area. We had the partnership act. Those are the three fundamentals. And what, unquestionably I think that we are a little behind time. My basic thrust is that if we're going to revise this act, I think we ought to use the revised act rather than the commission's

product. Now why the commission wasn't cognizant or didn't pay any attention to the revision that was in process is immaterial. I think, and it's immaterial how much effort has gone and how much, and granted the code revision commission has a very essential job and I support that. I think that the purpose of the code revision is sound. I think they're there to monitor and to suggest and to urge and to push changes. But my basic point is that I think that the bill before us is too narrowly conceived. And I don't think it profits us to go into the history. I've layed it out to some extent in that March 12, 1984 letter.

But I'd like to talk a little about closed corporations, if I may, which is the family corporation, the corporation with a small number of shareholders. And there are various definitions as to what we are talking about. If you start out with the premise that the corporation, one of its essential features, of course, is this limited liability which historically has proved its value. Of course, if you have a conviction that it's being used as a sword for evil, then you're concerned that any time you grant the privilege of limited liability, you're going to very closely monitor it. And I gather the theme of the code revision commission and Professor Fessler is that this is an area that has to be very, very closely guarded because there have been all kinds of abuses. And you don't just willy nilly grant limited liability. Well, I think we can talk for a great deal of, about whether or not there's been an abuse, or whether there's sufficient remedies. I think it's overdrawn, their concern about the abuses that exist. And I don't think we need, you know, the, I have more confidence in the business community. I have more confidence in directors than I think comes through in reading what I perceive in SB 246 and the commentary. I don't think they're all crooks. I don't think they're out to pillage necessarily. And I think that's something that I get a flavor of here.

With regard to the close corporations, most small business people that I've dealt with and I don't have the most extensive experience in the world, but there are others, view the corporation as a very useful device for doing business, a means of doing business. And they tend to be less formal about their relations between themselves and with the corporation. In my mind, the norms of corporate management which are important as the group gets larger are less important as they get into a smaller group. Whether you have a formal meeting or not, or how you communicate with each other, how you give notice. Those things don't have as much importance and should they. Well, if you read the material that was submitted with respect to the close corporation, you'll see the drafters, the people that have worked with the revised model, have prepared what they call a supplement of close corporations which is an adjunct or which can

be used if you choose to with the revised model act. And the history of the statutes are layed out there. Professor Fessler addressed that. But, of course, he has a very jaundiced view about the close corporation concept. He views the close corporations I gather from his memorandum, and more particularly pages 3 through 22 of the memorandum that I submitted to you, he's not very sympathetic to the close corporations concept. I respectfully disagree. And so do a lot of other legislators and academicians and business people throughout the nation. I believe it's worth considering.

JOSEPHSON: Well, I guess the talk of the day is what's the beef, where's the beef. I mean I'm not asking you where's the beef with 246, but where's the beef as you understand it with close corporations? Is it a device allegedly for cheating persons that it deals with? I understand that's not your position, but that is what you think Dr. Fessler . . .

REITMAN: Well, if you read pages 2 to 22 of his memorandum I think you'll see very clearly what he thinks about the close corporations. I'd be delighted to read it to you, time permitting. I think it would be a revelation. I think it's a revelation also in his attitude toward the corporate form. And in my letter, I read that memorandum of Professor Fessler after . . .

JOSEPHSON: What date is, what memorandum are you talking about?

REITMAN: All right. If you'll look at the letter of March 30, 1984, it's addressed to you.

JOSEPHSON: From you.

REITMAN: That's correct. All right. Do you have that?

JOSEPHSON: I got that.

REITMAN: All right. Well, attached to that letter, O.K., it's labeled appendix 1, if you will. There are two March 30 letters, Senator. Maybe you have the wrong one.

JOSEPHSON: Yes, O.K.

REITMAN: Starting at page 2, there is a discussion about the statutory treatment of closely held business. And I think this is a very interesting analysis or memorandum. I respectfully disagree with the thrust of the comments. And I'd be delighted to go into it in more detail, but I think your time is limited here.

JOSEPHSON: Well, I can study it . . .

REITMAN: I think its worthy. I think . if you don't read it, I think it's going to be a definite detriment in trying to come to any kind of judgment.

JOSEPHSON: One question that occurred to me, Mr. Fessler and Mr. Reitman, is how we assess this issue of protecting tradesmen and third parties in the light of liberalized bankruptcy clause. I mean it just seems to me . . .

REITMAN: Well, let me say this. You know originally the Alaska Statutes which also a model act revision as I recollect, did provide that one of the conditions of obtaining a corporate charter was that you had to have a thousand dollars of take in capital or words to that effect. That was deleted. I can't recall precisely when.

JOSEPHSON: Was that in money or kind?

REITMAN: Yes, money or property. And that was sort of an entree price. And there are some people who feel that if you grant limited liability . . . Right, exactly. That if you're going to grant a, I'm not suggesting that . necessarily support it, but I think there is a rational view that if you're going to give limited liability there should be some pool of capital, you see, which is available to creditors. And there is something to that. On the other hand, you know you're dealing with business people when they grant credit are supposed to understand what they're doing. This hasn't seemed to be a problem throughout the nation. We have statutes dealing with fraud. We've got the piercing of the corporate veil concept that's been around for a long time, despite the fact that some people pooh-pooh it and say well it's too elongated a procedure. I think there are certain risks that you have in doing business. This is like to create a riskless society, cradle to grave. We're going to provide for every little misstep that you're going to take. And in the process of doing that, what you're going to create is a discouragement or impediment to commerce and to business.

JOSEPHSON: I may be confused. We're talking about section 488 in terms of close corporations. Is section 488 limited to that situation? Is it limited to the large . . .

REITMAN: You mean the proposed 488 . . .

JOSEPHSON: Proposed 488 is limited to any corporation.

REITMAN: Correct. Yes, as far as I know is to any corporation. Close corporation is simply a concept that in

effect relaxes some of the more formal mechanisms or procedures that are implicit in the governance of a corporation. And particularly deals, Senator, with dealings among shareholders. Also transfer restrictions which are buy-sell agreements, which are an essential ingredient of any bargain amongs small business people. That's a very important concept. And that . . . what I said is that in the small corporation area, what is a matter of concern in the relations among shareholders, for example, transfer restrictions, buy-sell agreements designed to append to a partnership form to retain the identity of the shareholders and the people who are the equity owners in the . . . Now, those types of arrangements are, I won't say they're peculiar, but they're more apt to be utilized in the small corporation mode than they will be for large publicly held corporations.

JOSEPHSON: And how does this bill affect that, the buy-sell?

REITMAN: SB 246?

JOSEPHSON: Yes.

REITMAN: All right. For example, if I may, I believe I sent you material that comes out of the Revised Model Business Corporation Act for example. More particularly section 6.27. Let me see if I can find it. I think I sent this to you, but if I didn't I'd like to point it out now. This is in the Revised Model Business Corporation Act. It's section 6.27; it's captioned Restrictions on Transfer or Registration of Shares or Other Securities. And is a very extensive provision in a model.

JOSEPHSON: Do the articles and bylaws impose restrictions . . .

REITMAN: What I was just going to tell you is that there is much more flexibility in my judgment there than in here. Now, for example, let me just point this out if I may, one of the tools that practitioners have used not only in Alaska but in many other jurisdictions is a shareholders agreement. Now the shareholders agreement has run the gambit of judicial tolerance, and the law is not altogether clear. My understanding is that where there is unanimity among shareholders, you can do a great deal to in effect impinge on the norms of corporate governance. Now that particular tool, I think, is a very useful one. And it can deal with transfers, reasonable restrictions. Now in the commentary on SB 246, more particularly at page 37, sorry to have to get you into this, but if you want to get some of the . . .

JOSEPHSON: This is fun for me, it's practicing law again without the remuneration . . .

REITMAN: Well, join the club then. All right, page 37. And obviously you know we're just in all fairness, you have to

read a great deal more than I'm just pointing out to you. But the commentary, for example, says, and I'm about in the middle of a page, if you don't mind, please. "While the language of section 210(2) would not prohibit transfer restrictions from being introduced in a bylaw (this is referring to articles of incorporation) while the language would not prohibit transfer restrictions from being introduced in a bylaw, it would have to be a bylaw adopted by the vote or consent of the shareholders and could not bind shares outstanding prior to its adoption which neither voted for nor consented to such a scheme." Well, my concern was that very frequently these restrictions will appear not in a, they can't appear in a bylaw, no question, or they can appear in the articles, but they also are going to appear in shareholder agreements. I asked this question of Professor Fessler, and he pointed out to me that well there is no reference in the commentary to shareholder agreements, but the comments could certainly be expanded to include shareholder agreements. Now maybe that will assuage me, I don't think so. Rather, I think that the treatment that's in the Revised Model Business Corporation Act, and more particularly 6.27, is far more flexible and useful and is much more, and covers the waterfront far better than I believe is in here. This is an example simply of where I think the Revised Model Business Corporation Act provides a better vehicle for dealing with this particular area than does the proposed SB 246.

Staying with major themes if you will, Senator, I don't think there is any compelliing need that we must have a bill this session. Now I realize there's been a lot of work put into this revised code, but I don't think we have, I don't feel any compulsion to jump. We want to get the best product, we want to look for alternatives. The model act is an excellent alternative, and we should be convinced that this product which, incidentally, has been worked upon and there were contributions here from lawyers from Delaware, from lawyers from New York, from lawyers from California and other big states, Texas. In fact the professor of the ------ reporter is a professor from the University of Texas Law School at Hamilton who has written extensively in this area. And I daresay that if you talked to Professor Hamilton you might get slightly different views than you get from Professor Fessler.

JOSEPHSON: Let me ask you a question, maybe this is a farfetched thing, but it may eliminate one aspect of it. And I'd like Dr. Fessler to talk about this, too. Suppose I were to hypothetically retire from the Senate, voluntarily or otherwise, and somebody came to me and said we'd like to start a business and hand you, and we're going to put a monthly newsletter out about government in Alaska, and we'd like you to write a feature article and serve as vice president of this corporation to be called "Alaska Government Reports Incorporated." And we'll give you some shares in the business and you're going to do some editorial work for us and we'll handle everything else. Under

the bill, would I have to be thinking about my liabilities under 488 if I got into such a venture without, I wanted to do it as a service or I wanted . . . Would I have to be thinking about potential exposure, contingent liability anyway.

REITMAN: Let me answer this way. First, let's take out even the granting of an equity interest. Let's suppose you don't even give them any equity. Well, I would say you bet your boots you better bet concerned. I think you better read 488 and see what it does for you, because you're going to be surprised. And let me say something else. I know, Jerry Kurtz said that he's neutral on 488 . . .

JOSEPHSON: I don't think he said that, he said it could be severable.

REITMAN: I've heard him say he's neutral on it. He thinks that's the position that has to be decided. Apparently the commission feels quite strongly because they put 488 in there. Of course, now I suppose it's kind of a throw away. In other words I get the message now you know you knock it out, we won't fight you on it to save our bill. But I think you've got a bigger problem than 488 in here, Senator.

JOSEPHSON: Do have anything else you want to add right now?

REITMAN: Well, I'd like to, I think it's imperative, I really do, and I, in all fairness to Professor Fessler, I see time is running out. I think you ought to read that pages 2 through 22 of that memorandum because it not only gives you a flavor of close corporations, you get a flavor of Professor Fessler's attitude on corporations. And I think it's important because, and the reason for it, if you don't mind, Senator, there is for example at, let me see if I can find it quickly. There is a phrase in one of the memorandum. I wish I could put my finger on it about, well, it's a reference to giving the key to the penthouse of the thoughts. It comes right from Professor Fessler's memorandum. It's an old saw. But the concern I have, Senator, is that the attitude here of that there are all kinds of misconduct going on in Alaska and directors are not to be trusted, officers are not necessarily to be trusted, we've got to protect. You know, we're going to protect the consumer, you know, let us at it. And that permeates the statute, and I think that's the wrong philosophy. I don't share those concerns. I think there are abuses, sure there are abuses. There are abuses under the tightest statute you can draft and that's why we have them.

JOSEPHSON: We just discussed the hypothetical of the small group that wants to publish a monthly news letter. What about the question of a major investor who wants to come in with us and say start an airline in competition with Alaska Airlines?

And he has the choice of domestic Alaska incorporation or a foreign corporation chartered somewhere else I suppose. I would assume that if HB 343 were enacted with 488 that that investor's attorneys would say you may want to incorporate in the State of Washington or California or someplace . . .

FESSLER: Senator, if 488 were applied to officers and directors of a foreign corporation doing business in Alaska, does it mean the bill left Alaska citizens unpaid?

JOSEPHSON: O.K. It wouldn't have a choice of incorporation. Well, in that instance would there be any tendency not to do business in Alaska at all because of the potential exposure of the officers if the economic venture went belly up? And if that's so, is that good policy. I mean it may be good policy because you protect the Alaska creditors or it may not be good policy because you leave undone some imaginative venture that would benefit Alaska's economy. I don't know the answer to that.

REITMAN: Senator, may I answer that question a little differently?

JOSEPHSON: Sure.

REITMAN: You ask the question assuming 488 was excised in the bill, let's assume that the you know the throw away is adopted, I don't think the legislature will. My personal opinion is I would be real surprised if the legislature adopted 488. But let's suppose the legislature buys excising 488 and adopting the rest of SB 246 . . . All right. I've heard a couple of experienced practitioners here, and we do have some experienced practitioners here in the business area, even if these ten people, ten lawyers on this committee have a fair amount of experience, including areas that I haven't had that much experience. And there's one chap that's had a fair amount of securities work which I don't think I've done but a smattering of. And incidentally I don't think any of the ten of us has had the experience, the varied experience and exposure, that the members of this American Bar Association group have had. They've had more extensive experience. But if I were advising a small Alaskan corporation, aside from 488 now, all right, and you had SB 246, I would look very, very hard at not using, not incorporating that group in another jurisdiction. Of course, obviously qualifying them to do business in Alaska. Why? Because the rest of SB 246 to repeat is not as utilitarian, as flexible, and as sympathetic, if you will, to the needs of the users of that particular business form.

JOSEPHSON: All right. Thank you, Mr. Reitman. Dr. Fessler.

FESSLER: Well, Senator, you can first comment to the

record that I probably look more frumpy than radical. I am the individual described at great length in Mr. Reitman's letter, and I am the individual who Mr. Abbott as chairman of the committee was doubtless moved to seek to hold harmless against the accusations in Mr. Reitman's letter in the statement that he read.

There are a number of things which I would like to comment on, but I am most anxious to respond and enter into a dialogue with you on matters of your concern. If I could I'd like to talk about these ideas and if they're not ones that interest you, then I'll talk about others. It seems to me legitimate to first take up the question, is the code revision commission's product unique. Had you been handed a suggested piece of legislation which, for whatever reason, is so without precedent that it would create for Alaska a sort of insular corporations code that other people would find difficult to understand and off putting because of their lack of familiarity with it. An ancilliary charge that is leveled is that the code reflects the peculiar biases of which I have somehow managed to convince the Alaskans who have worked to employ my services over the last four years. I will ask that there be incorporated in the record the chart which is prepared which tracks and makes quite graphic the paternity of every provision of this statute.

We will begin by noting that there is only one provision of the statute which is repeated in two other places which is without an ability to trace its paternity to the laws of other jurisdictions including the model act, and that is the provision which the legislature recently inserted regarding the disclosure of alien affiliates and alien control persons which was a particular value judgment made by the legislature which the code revision commission declined to question because of its recent origin, a legislative value judgment which is excoriated as being unnecessary, and the commission is twice taken to task in subcommittees or task force report for its failure to eliminate these recent things. So, is this a strange act. No, sir, not if you read it. It is accompanied by a commentary which has a source, which explains the impact upon existing Alaska statutory law, identifies the statutory bases, indicates where modifications of those statutory bases have been for every single provision. One only wishes, as a personal aside, that these matters had been read before they were characterized. I think that fortunately your staff and Mr. Butler have taken the time and the trouble to read this document, rather than to speak about it in generalities.

So the ACC is not unique. Now is it a carbon copy of existing Alaska law. No, sir, it is not. Although as you will see in the very first column the tracking of the impact on existing Alaska law is done with regard to every section. This is because, and one can find no more eloquent statement for the reason as to why it is not a carbon copy of existing Alaska law,

than the book which Mr. Reitman has thrust upon you with the zeal of someone converted to a new religion. And this biblical text which sets forth the reasons why the American Bar Association's committee on corporate laws has chosen to engage in its work beginning at Roman 15, that's the page and not the scriptural citation, sets forth the major changes in the concepts of corporate law thinking that have taken place since 1969. Now those changes would be interesting to contrast with the major thrust of the reforms which the commission in its independent work has come up with. You will notice that the first major change noticed here deals with financial provisions. What has happened is that the State of California spending approximately three years in the gestation process in 1977 came up with a corporations code which for the first time broke with all the traditional concepts of legal accounting and substituted very simple and easily understood concepts of when it was licit for a corporation to make a distribution of its assets to its beneficial owners and when it was . . . [TAPE CHANGE] Concepts of legal accounting follows California by using a surplus, excuse me, a ratio between assets and liabilities as a very straightforward approach, and this is, of course, the very provision which the Alaska Code Revision Commission had embraced some two years ago when in its provision on financials which are intriguingly reviewed by one of the task force members, Mr. Brundin, sets forth the very provision now embraced by the Revised Model Business Corporation Act.

B. Standard of care for directors and officers. The ACC, the Alaska Corporations Code, were the legislature to adopt the commission's recommendation, anticipates and also defines standards of care for directors and officers withdrawing this from the realm of conjecture where it is currently under Alaska law.

Principles relating to derivative litigation. There have been major changes. Alaska has the dubious distinction of being one of two American states which has no statute on derivative actions. The task force suggests we stay in that position, since the Revised Model Business Corporation Act laughs at such a nonsensical idea. You will notice that the task force report, therefore, is at variance again with the very document which they are urging be the substitute for the work done by the Alaskans who worked up this code now pending in the legislature over a period of four years.

JOSEPHSON: What you're telling me is that between their written material and the Model Business Corporation Act, that there are discrepancies.

FESSLER: There is heresy, sir. Yes, the bible isn't followed at all. And I will [illegible]vide your committee, because I think it is necessary with a section by section response which also compares to the Revised Model Business Corporation Act, the

recommendations of the task force. I want to be very clear. As I read the recommendations of the task force, I found some interesting ideas. There are some ideas there which I believe would improve not only the bill which we have proposed, but also the Revised Model Business Corporation Act. I believe, however, that one cannot come away with a fair reading of the work of the task force with the conclusion that there has been generated some reason to stop the legislative development of the Alaska Corporations Code. To study it, to refine it, to revise it, to amend it, that's part of the legislative process. The code revision commission has to my knowledge never been fairly susceptible of a charge of handing a bill to the legislature with the imperious attitude that you had to take this thing lock, stock and barrel. There are no "throw away" provisions in this bill to my knowledge. That again is some of the terminology injected by Mr. Reitman. But there are keen sensibilities that the commission's legislative task is to propose legislation, it is the legislature's duty to dispose of those proposals.

We have been and I was peculiarly offended by the statement in the letter of transmittal by Mr. Block that I was unavailable in a timely manner. That, sir, simply is not true. And if there are individuals in this audience who are offended by having that lack of accuracy pointed out, the offense lies with the inaccuracy not with the accusation. I continue to remain willing because it is my responsibility. I have a strong interest in seeing Alaska get, along with Mr. Reitman, the best possible corporations code you can have. Now, would it be wise for Alaska to simply adopt the Revised Model Business Corporation Act. Mr. Reitman is offended by the use of the phrase in Chairman Abbott's letter of transmittal to Senator Ray that the first Alaska Business Corporation Act was off the rack. And yet there is not much tailored about asking you to take a gray comb out of a brown envelope and simply enact it because it came from Chicago.

There are indeed a number of very distinguished lawyers who are on the Business Law Section, but Mr. Reitman is confused if he is representing that they are the individuals who in deliberate body have sat down and passed upon all of the provisions of the exposure draft. The exposure draft is basically and essentially the work of a colleague of mine, Professor Robert Hamilton, at the University of Texas. I got to know Bob fairly well when I was invited to teach at the University of Texas as a visitor and had an office directly across the hall. It is, of course, noted that there are no Alaskans on that particular committee. This bill is not now the law in any jurisdiction. When you read the task force continued lauding of the Model Business Corporation Act and the fact that it is widespread among jurisdictions, a statement which has elements of truth about it as Mr. Kurtz noted for you, please understand that those are referring to the historical Model Business Corporation Act. The continuing utility is now impeached

by the framers of the Revised Model Business Corporation Act. How long it will be, or what state will have the distinction of becoming the first to adopt the Revised Model Business Corporation Act, we do not know. It could conceivably be, if Mr. Reitman is correct, that it ought to be Alaska. But it is not now the law in any jurisdiction.

You will read statements in the task force report which indicate that it is highly desirable that Alaska have a statute which is congruent with the laws of other jurisdictions. You will have a statute, sir, congruent with the laws of other jurisdictions, including the major commercial jurisdiction on which much Alaska business depends, the State of California organized along the very useful mode set out by the State of New York, were the legislature to follow the recommendations of the code revision commission and adopt this bill. So far from painting yourself into a corner, it would be my considered judgment that you would be moving yourself into the mainstream of the thinking of corporate thought were the Senate to grant favorable consideration, the Judiciary Committee and then on the floor to the recommendations of the Labor and Commerce Committee, which has reported this bill forward.

Now, one problem that does exist which I would urge is a good reason to think a long time before sticking with the suggestion that you merely attempt to follow suit or indeed bid because you would be leading the suit here with regard to the Revised Model Business Corporation Act. The existing Model Business Corporation Act has been adopted in many states including the basis of the law of Oregon and Washington. It has also been judicially interpreted in those many states. Unfortunately, the judicial interpretation of that act is frequently not in one mind. There are contradictory interpretations which render the provisions of what appears to be a singular statute having a cacophony of different judicial views.

JOSEPHSON: You know, as I remember the uniform act as interpreted in one jurisdiction was susceptible to the same interpretation elsewhere.

FESSLER: Indeed, the Uniform Commercial Code has a provision in it by which the legislature commends the desire of maintaining uniformity to the trial courts of its state . . .

JOSEPHSON: But the model acts do not contain . . .

FESSLER: They have never aspired to such a thing. And one of the reasons that we've spent a great deal of time developing these commentaries, because you see we've carried forward so much of the model act, it would be silly not to. But we've also tried to identify where there are divergent lines of case law interpretation to characterize the value judgments which

those basic lines of case law interpretation embrace. And then to state for the legislature that in adopting this act twenty some years after we've done it the first time, it is the intention of the legislature to sanction and approve the following line of cases. In other words, to make a choice. So that a trial judge in Alaska who has very little appellate precedent law to go with in interpreting the model act is not forced to spend a great deal of time and generate substantial fees for attorneys who are in good faith peddling West Virginia's view on this topic, as against an intermediate court of appeals in Florida, as against a rather obtuse decision of the supreme court of South Dakota. My job was to try and gather those divergent lines and to interpret them. And that is one of the work products which the legislature has the opportunity to take avail of. Professor Hamilton candidly concedes that he did not undertake to do that. That that was simply too large a task.

JOSEPHSON: Professor Hamilton, the reporter . . .

FESSLER: Yes, they're not going to try and resolve the fire fights and disputes that they do admit exist in the decisional law which has grown up around the model act. Even in instances where the model act is essentially repeating itself. As I say, it would be silly for any of us to believe that we would have to reinvent the wheel.

Now, there has been a lot of discussion about section 488 . . .

JOSEPHSON: Excuse me, Professor, should the legislature adopt the bill, something like the form we have it, you would recommend perhaps that the commentary be a part of the legislative history or . . .

FESSLER: Yes, indeed, your colleague, Senator Mulcahy, made the point in the Labor and Commerce Committee that it would be wise. I believe he used the term a concurrent resolution be adopted to recognize the comments and to give them the status of legislative history. That I think would be a very, very useful step in guiding Alaska practitioners. There simply is no need to have every one of these matters cast into doubt when they could in a seminal look at the business law recognize that we're talking not only about statutory law, but we're talking about decisional law as well which grows up and is influenced the statute.

If I might for a moment on the topic of limited liability. I think you put your finger on my basic problem here when you noted that the corporation as we currently recognize it as it was reflected in the model act when it was originally drafted was conceived as a means of gathering capital from passive investors to put it in the hands of a dynamic management which would then go out and make jobs and make opportunities in

the marketplace. I urge you along with Mr. Reitman to read the memorandum, the background memorandum which my office furnished along with all other background memorandum to the members of the task force, and which they are all sitting in Juneau and available to your staff as well. Mr. Reitman, however, is extolling a very different animal when he speaks of close corporations. He's speaking of a corporation owned by one or two persons who intends to gather capital from no distant source whatsoever. A corporation which, according to Mr. Reitman's view of the world, should be allowed to relax the observance of any norms of corporate existence. Won't have meetings, won't do anything. What will it then do. President Reagan and the Congress has pretty well eliminated most of the federal tax advantage. When you read my memorandum you will find it in that sense prophetic. It wouldn't be very sensible to have me paying $4,000 in taxes on one income because I call myself Dan Fessler, Inc. And you, because you are just plain Joe Josephson, paying $14,500 in taxes on the identical federal income. That's the way it was before the Congress two years ago began to revise the Internal Revenue Code. Limited liability is therefore, according to Mr. Reitman's own view of the world, the reason for my putting inc. after my name.

Now, one man's limited liability is another man's unpaid bill. The economic impact analysis which we were told as going to be forthcoming from the task force is one which occupies a paragraph, and I invite you to read it. It talks about the oil of the future being the ability to move capital around. Well, I am perfectly sympathetic to corporations. The notion that I am not would make it rather strange the way I have spent my professional career. But perhaps because I work with a lot of students who ask a lot of questions, long before Clara phrased the matter for Wendy's, began to look at some of these one and two man corporations with no formal matters which can be successfully knocked over when using the alter ego or instrumentality theories by creditors who have the amount of money to hire attorneys to do so. But the little fellows who don't, of course, they can't pierce the corporate veil. There never has been at the appellate level in Alaska a successful piercing of the corporate veil. It's been tried twice. So to suggest that small creditors, the targets of protection under section 488, are currently well provided is something the legislature, I think most of the members including the 16 brothers and sisters that you have who are lay people, will have a fairly decent idea about.

And please note this, section 488 you had indicated in one line of questioning to one of the witnesses, I believe it was Commissioner Kurtz, could't a creditor under existing law ask for the personal guarantees of an officer and director. And the answer, of course, is yes. But under section 488, the corporation is also quite free to confront creditors with the fact that it will ask creditors to waive the liability which is

created presumptively up to $25,000 per the creditor under section 488, and ask him to waive it. And if he does so in writing, it's gone. It's gone.

JOSEPHSON: That would be kind of an alarming thing, though, to go to a supplier and say I want to order 300 widgets, and the supplier says wonderful, we have the best widgets in the world. And then you say oh by the way, I am an officer of the corporation and I want you to sign this form waiving my individual responsibilities . . .

FESSLER: Certainly, it focuses his idea on the practical risk you are asking him to take, isn't it?

JOSEPHSON: As a practical matter, that's not going to happen very often. Well, I hear what you're saying. But let me just ask this. I'm grateful that you are here, Dr., for this kind of exchange, but . . .

FESSLER: By the way, I'll be in Juneau, sir, next week. We don't have classes a week from this coming Monday and could meet with any interested parties including members of the task force at that time to engage in a dialogue . . .

JOSEPHSON: You say that one person's limited liability is another person's unpaid bill which is a good way of putting it. But then on the other hand, there seems to be some countervailing policy about encouraging people in the private sector to take risks and . . . its course as a consequence sometimes other people get stuck with those risks. But there will be some forms of economic activity that will be undertaken if there is limited liability. I'm positive of this, and which will not be taken if there is no limitation on liability. Is that probably fair to say?

FESSLER: Yes, but it's not historically fair to say. You see, historically corporations did not have the notion that one person could become a corporation. Historically corporations did not have the very low capitalization requirements. Historically there was no relaxation with respect to shareholder agreements or things of this matter. What has happened is that, and it's human nature, individuals doing busines in the corporate form have wanted more and more of the benefits while at the same time wishing to pay less and less heed to the exactions which historically have been asked of people who wanted those benefits. And so the suggestion which 488 presents your Judiciary Committee with is the opportunity to look to see whether or not in now looking at the matter in its entire picture it would be wise in any way to redress that balance.

JOSEPHSON: But 488 goes beyond the one or two people . . .

FESSLER: Indeed it does, sir. Indeed it does.

JOSEPHSON: So that's my point. Someone's leaving out SEC type problems. Someone comes to me and says we're getting together a group of investors because we think that at Jones Creek 57 miles out of Anchorage there may be the El Dorado gold mine. And we're asking everybody to chip in some dollars and here is, and we're going to use the corporate form. 488 would perhaps be a further dampening down of that kind of activity, wouldn't it?

FESSLER: Well, as to the investors it would not because unlike the New York model which imposes the liability for the unpaid claims of employees on the ten largest shareholders, whether they are active in the business or not. Section 488 suggests imposing no liability on shareholders per se at all. That the thought wsa better to have the liability consequences on those who are actually running the business and . . .

JOSEPHSON: Passive members don't have to worry . . .

FESSLER: Passive members have no concern at all. Indeed, a large shareholder who is not an officer or director would have no liability here. It is the officers and the directors who would have the liability under section 488 because they are the ones who go out and enter into contracts. And then I think you'd have to have ask yourself, well, would it be prudential in having them scale back the level of commitments they make with persons who would have the benefit of the protection of section 488 to realize that if corporate assets prove insufficient, then their own assets up to $25,000 in a joint and several liability setting would be available to this defined class of creditors.

JOSEPHSON: Per creditor.

FESSLER: Absolutely. We have repeatedly made the statement that the $25,000 is per creditor. Further, that it cannot be, that $25,000 limitation cannot be evaded by my assigning to you an interest in the claim. It is a nondivisible interest per creditor. Again, the $25,000 figure was the figure which was set here in the commission. I can tell you the genesis of it. The figure was kicked around. It was higher at one time, lower in another in discussion. And then the thought was well how much money really has to be at stake before you could ever get a lawyer interested in litigating a piercing of the corporate veil. Well, for a four, five or ten thousand dollar claim it won't happen, Senator. It just won't happen. And so that figure, as Mr. Butler asked in his memorandum to the commission to which I responded, that figure of course is malleable. It could be made larger, it could be made smaller. But I do agree with Mr. Reitman, I suppose on more areas than would have ever emerged in

this colloquy, but I do agree in one area. That this is something which the legislature should take a very hard look at. And I guess I merely resent any implication that it has been anything other than widely touted. This was the topic of the talk I gave to the Alaska Bar Association convention in 1982. Again in the Rotary Clubs around Anchorage. Again by videotape and in person in 1982 in December.

JOSEPHSON: O.K. Well, I was asking this question before you came to the witness stand regarding bankruptcy. The creditors and business people I talked to were meant the ease with which debts are discharged in bankruptcy. And I guess what I'm seeing here is an effort to provide creditors with protection when they deal with Alaska corporations on the one hand, and the present federal policy which seems to ease the way in which debtors rid themselves of their obligations. In that light, is this all futile anyway? Are the creditors still going to get any protection since it's so easy to discharge your debts?

FESSLER: Well, if the corporation is declaring itself bankrupt or forced involuntarily into bankruptcy, it would remain to be seen definitively how federal law would coordinate with section 488 should the Alaska legislature adopt it. The general coordination policy is then that the assets of the bankrupt would be augmented by all liabilities that the bankrupt is able to assert either primarily or secondarily. So that it would not be a futile act. But it would simply mean that the assets of that bankrupt would be augmented to the extent permitted under section 488 under state law. If there ever were obviously a conflict between state and federal law in the bankruptcy field, federal law would have primacy.

JOSEPHSON: I'm not sure I know what you mean by augmentation in this case . . .

FESSLER: Well, let us say that I run Fat Chance Corporation, and it's now been run into the ground. It has a hundred thousand dollars in outstanding liabilities, and it has two thousand dollars in assets. Now the question that the bankruptcy court has to determine are what are the real dimension of the assets of Fat Chance Corporation and are available to the creditors. And it is the task of the bankruptcy referee now bankruptcy judge to make those determinations. If he saw section 488 on the state books, then you see the creditors who were protected under that would be given an augmentation of the bankrupt's assets. In other words it would not discharge the liability of the individuals who would have this secondary liability.

JOSEPHSON: They can be remanded in some form to the assets of the directors or officers.

FESSLER: Yes. Now you had asked also and it might for

time reasons be better if I submitted to you in writing a list of certain of the articles, excuse me, of the provisions of the ACC which would afford greater protection to stockholders. If I can I would be happy to provide that to the committee in writing, and I will also forward copies to the members of the task force.

JOSEPHSON: All right. Thank you.

FESSLER: If there are no other questions, thank you, sir.

JOSEPHSON: We have now heard from all who've asked to be heard except from Mr. Eggers.

EGGERS: What's your pleasure, Senator, do you want to listen to me for five minutes or . . . For the record my name is Kenneth Eggers. And first of all let me state that I felt that today was not going to be a formal hearing but rather was going to be a meeting between the code revision commission and certain members of the bar association who have taken an interest in the product of the code revision commission. So I'm not really prepared with a formal statement.

JOSEPHSON: By the way after I leave if the rest of you want to sit and chat about this, go ahead . . .

EGGERS: Well, you've stolen some words from my mouth because quite frankly after hearing the comments of John Abbott, I don't think I want to sit down with Mr. Abbott and try to discuss it. I do take his comments very personal. I do take them as an attack on my integrity. And for the record, because I do oppose adoption of SB 246, I would like to state where I am coming from if you will.

I've practiced in Alaska for eleven years. Have numerous clients who are corporations, and I work with the corporation code on if not a daily basis on a weekly basis. I'm proud that I'm part of this so called self appointed committee. The members of the bar have been criticized over the years for not volunteering their time, and that's exactly what each of us are doing. As far as I am aware, nobody on this so called self appointed committee is being compensated by clients or otherwise. And the only reason we are here is because we are interested in the statute that is being considered by the legislature. I've probably spent twenty hours of my time on this particular project, and I'm sure that others have done the same, if not more. I believe that Mr. Reitman probably approaches a hundred hours or better. I've had conferences with him, and just on the basis of those conferences I know that he's spent a great deal of time.

I think some of the ill will that may have developed is because you know, I speak just for myself, but I am somewhat of a

johnny-come-lately. And I have, I know, apologize to Mr. Abbott informally because if that is what's causing his problems with my actions. And now formally I will apologize to him in his capacity as chairman of the code revision commission, to Jerry Kurtz, Professor Fessler and any other members of that committee that are offended by the fact that where have I been for the last two or three years. But I have to live by the adage, better late than never.

In the interest of time, there has been a committee hearing, joint committee hearing, by the House Judiciary and Labor and Commerce Committees on February 24th, and that has been transcribed and Mr. Kelly will be submitting to you a copy of that transcript and I would like that to be incorporated into the record if you would.

My concern is that I perceive the proposed statute to be a unique bill contrary to what others may have said. And I say that if you look at the letter of transmittal to Chairman Ray, I think an accurate characterization of that letter is as they say, it's not the New York, it's not the California bill and it's not the model act. Well, to me I think an apt characterization of what we have then is a unique bill.

JOSEPHSON: It's unique but it's eclectic, I guess that's . . .

EGGERS: I believe that that is the case. And then so what are we going to have, we're going to have a unique bill which our supreme court is probably going to put a unique interpretation on. And that does concern me as a practitioner. In the last two or three years I've been contacted by some major corporations that were interested in doing work in Alaska. And normally the first question that they ask is what is your tax structure. And then the second question they ask is is there anything unique that we should be aware of about doing business in Alaska.

What I would like to see, and I don't know if the legislature as a legislature or the Judiciary Committee as a committee could do this is quite frankly I do feel more comfortable with the model act, O.K., but I'm not ready to adopt it. And I'm not asking, and I'm speaking for myself. And I think everybody on the committee is doing the same, speaking for themselves. I'm not asking you to adopt the most current exposure draft of the model act, but I think what would make me feel more comfortable is if the code revision commission would take the model act, and I think that it will be finally signed off on here within the next couple months. At least that's my understanding. Take that and then use that as the medium and point out where Alaska is different, where the proposed code revision commission differs. And then if I can see those differences, I would feel more comfortable. I've examined the

proposed statute. I've examined the commentary. And in reading those two, and like I say twenty hours I'm sure based upon the time that the commission that Jerry Kurtz and John Abbott and Professor Fessler sent that, that's probably maybe one-tenth of the amount of time. Or maybe one percent, I don't know, of the time that they've spent, and I realize that that's not a great deal of time. It's a great deal of time out of my practice, but overall it may not be a great deal of time. But in that time in looking at it, I am unable to figure out if you will where the differences lie. And I think that's something the legislature should be concerned with.

I disagree that section 488 you know stands alone. I think somebody said that it stands alone, or that's just my characterization of what they said. I really, I guess prior to John Abbott's comments I would have thought that it was not a red herring, now I'm really starting to wonder if it wasn't thrown in there sort of as a set up. But I'm glad that they put it in there, because that is what attracted people's attention . . . [TAPE CHANGE] And so I want to make it very clear that it is not my position that if you delete section 488 that then I have no further problems with the code because that certainly is not true and it is not accurate.

But let me just say something about section 488, and I will be brief. I think that as a policy in this state we do want to encourage venture capital, we do want to encourage good people to serve as directors and officers on the corporation, and I think that this will, section 488, will be a disincentive to that goal. I believe that we are presently protected from fraud by case law, and I stand to be corrected but I'm almost certain within the last one or two years contrary to what Professor Fessler said, I think our supreme court has upheld a case out of Southeastern where the lower court had pierced the corporate veil. And I feel fairly comfortable, but you know I stand to be corrected on that. Now to the extent the legislature and the commission may be concerned about fraud or fraudulent corporations, you know the type of people who set up these fraudulent corporations, they are the same type of people that will have no qualms about doing business as a partnership or as a sole proprietorship and walking over to the bankruptcy court and taking care of their problems in that manner. So I just think that that's a red herring.

That's really are my comments, and I want to thank you for coming to Anchorage and thank you for your time.

JOSEPHSON: Thank you.

GARDNER: Gentlemen, I didn't get on the list. I have eleven comments of Mr Eggers, if I could have a moment. I missed most of Mr. Abbott's comments so I'm not as outraged as I might be after I ask what they were, so I'm not going to respond to

that.

JOSEPHSON: I'm not going to tell you. Would you identify yourself.

GARDNER: My name is Ray Gardner, and I work with Hartig, Rhodes, etc., and I've served on the I guess task force or ad hoc committee depending on your prospective. The only thing that I wanted to point out, and it was an issue that I think that was raised in your mind but I wanted to emphasize it is that I think that this code, not just 488, I think 488 is probably the greatest example of that, has a great disregard for the venture capitalists in Alaska and the importance of those individuals who are able and willing to take risks with certain limited portions of their available funds in activities such as mining and certainly fishing. I think those are the two most important areas. My practice revolves around the mining and resources area. And particularly the miners are willing to take large sums of money and take substantial risks with it. But they don't want to be in the position of selling their house and their car, and their families and their future is going to be completely put at risk. And that's the advantage of the kind of corporate form that we see in Alaska.

JOSEPHSON: Well, Mr. Gardner, I asked that question as you recall because I was concerned about mining and the answer was that the passive investor should have no concern and only the active . . .

GARDNER: Well, that's true. But the normal mining venture that I encounter is about three different individuals. They serve as officers and directors and shareholders, and I see that very, very common throughout my practice.

JOSEPHSON: In the mining field, the old tradition was the grubstake kind of thing where you dealt with a tradesman on a basis of a contingency, I suppose, as shared. Is that still the custom? In other words instead of going to the suppliers of, the D-8 caterpillar store if they use D-8 caterpillars . . .

GARDNER: Well, they still do, I can assure you of that.

JOSEPHSON: And saying I want to lease or buy your caterpillar, but I'm not going to, but I want you to also to waive my individual liability, you probably wouldn't do that. You'd probably go and say I want to use it up at such and such a creek, and if I strike it what interest do you want in the mine? Is that what's happening?

GARDNER: That still happens. That does still happen, but to a large degree some of the equipment is so much more sophisticated now. Rather than just a cat going out on the Kenai

Peninsula to some few unpatented claims and having an adventure for the summer, so see what you can come up. But even still in the mining industry you see a whole significant number of people who are just kind of old salty Alaskans who are taking maybe their life savings. They've pooled it together, three, four, maybe as many as five people, they want to form a corporation and put that money in there without incurring any further personal risk beyond that and going out and giving it a try for a season or two seasons and seeing what they come up with. They're not out to defraud anybody. They're going to take some risk. They're willing to put their money on the line. And I think that that is a typically Alaskan activity that is nowhere considered in this code.

Now commercial fishing I think is very much the same way. I don't represent many fishermen, but I see that as happening.

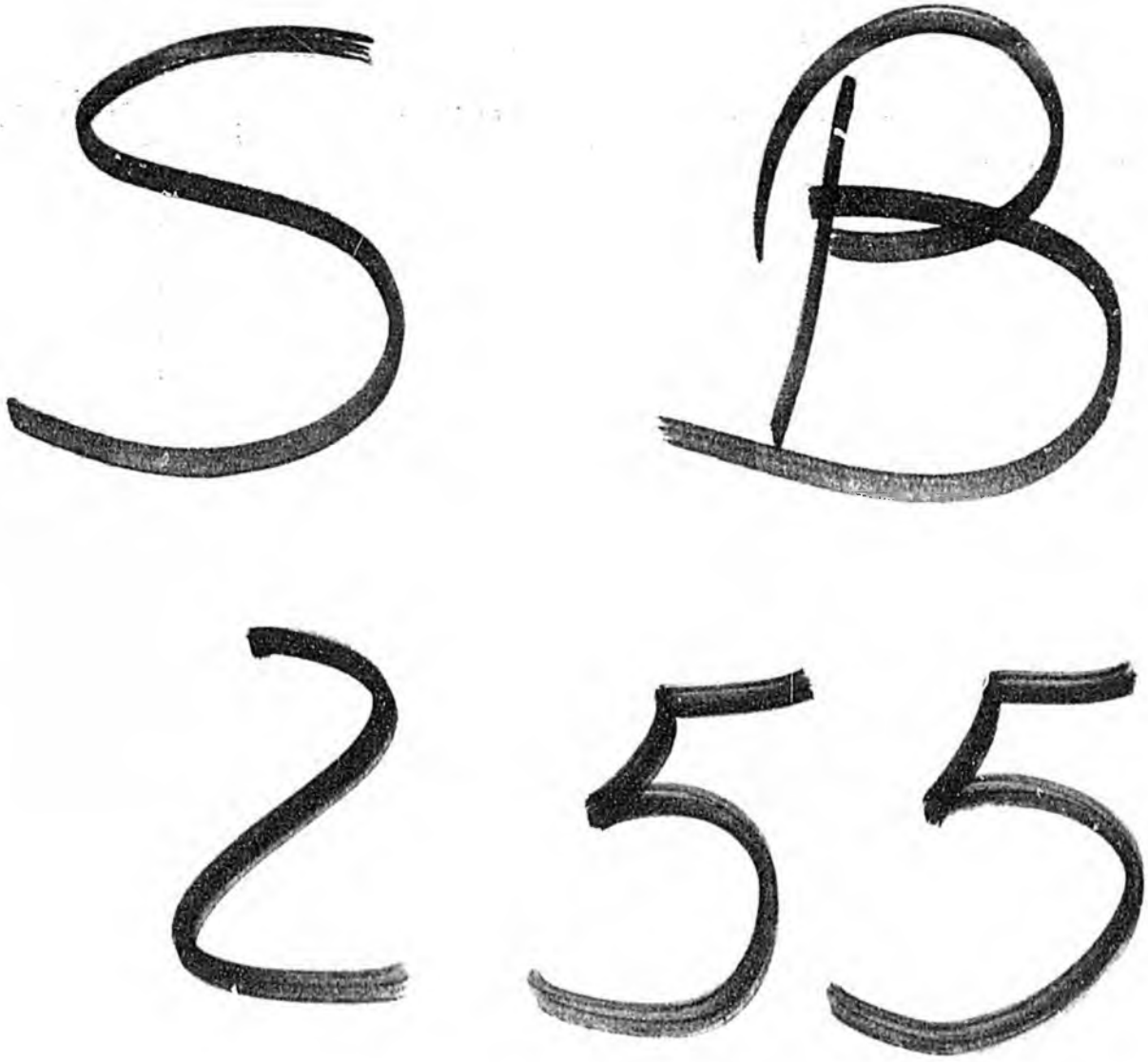
JOSEPHSON: What about the other side of the coin where they go down to Lee's Cafe or someplace, and they find someone to work on this venture and can't pay him at the end of the season. What's the result there?

GARDNER: I think more often than not, most of the individuals that are working the mining claims who don't have a direct equity interest in the venture have no other expectation than receiving their pay out of production. Whatever that may be. And those are generally, they cut agreements. Unfortunately they don't put them in writing, but I think that it's on the handshake and they go in it knowing if it doesn't pan out, I'm not going to get paid. And that's not unusual at all. That's a risk they know they're taking, and they're certainly not looking at something like 488 to protect them.

JOSEPHSON: I do have to excuse myself. Is there anything else that you wanted to say?

GARDNER: One thing and that is I think this bill is largely misperceived in the business community. And I know that we've heard that the bar has been spoken to on a number of occasions, and they may have or should have a better understanding. When Ken Calhoun presented this bill to the Chamber of Commerce at one of their weekly meetings, he said there was $25,000 exposure. They don't know it's per creditor. They don't know the implications of this, and I think it needs more publicity and more comment. And those comments should be elicited from the business community.

JOSEPHSON: Well, I'm very grateful to all of you for coming on this holiday Saturday. And thank you for your time.


SB
255

COMMITTEE REPORT

SENATE

FURTHER:

Date: _____

Mr. President:

The Committee on _____ has had _____

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

_____

_____

_____

_____

_____

_____

_____

_____

_____

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

_____

_____

_____

_____

_____

_____

CHAIRMAN

SB 255

Municipality of Anchorage

POUCH 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4545

TONY KNOWLES
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

March 15, 1983

Janet Rice, Administrative Assistant
Representative Don Clocksin
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Municipal Liability for Court Costs

Dear Ms. Rice:

Per your request, I have attempted to set forth the financial impact involved in a return to the pre-1976 practice of requiring the Municipality to fund the cost of public defense for those charged under local offenses.

Our cost estimates are premised on the assumption that it would take a minimum of 4 full time attorneys plus one legal intern to handle the volume of public defense work generated by the Municipal Prosecutor's Office. I believe the staffing level is a very conservative estimate based on two separate analyses. First, we made our own projection based on the level of our prosecutor's professional staff (6 staff attorneys and 2 legal interns) and the percentage of cases that we handle that are defended at public expense. Approximately 60% of all of our trials are defended by the Public Dedender's Agency while over 80% of our motion practice is generated by or directed to that office. We have thus estimated that approximately 75% of our total prosecution effort is directed towards criminal defendants represented by public defenders. Assuming that the effort directed towards prosecution and defense of a criminal charge is, on balance, approximately equal, we believe it would require a minimum of 4 attorneys and 1 legal intern to defend those cases for which the court has appointed public defense.

We have attempted to confirm our estimates with information from the Public Defender's Office on the level of effort that they

direct towards municipal cases. I am informed that office now has a staff of 6 full time attorneys assigned to misdemeanor cases. Attorneys in that unit estimate that approximately 80% of all misdemeanor cases they handle are municipal prosecutions, the balance being state prosecution generated by the State Troopers in areas of the Municipality outside the police service area (primarily the Hillside and Turnagain Arm areas). That means that currently the Public Defender's Office dedicates approximately 4.8 attorneys to municipal cases on a full time basis.

Using the level of 4 attorneys and 1 legal intern, I have made cost estimates in three alternative ways. First, I have taken 75% of the current Municipal Prosecutor's budget. I have reduced this amount by approximately $35,000 to reflect the occasional support work provided by the Prosecutor's Office to the Anchorage Police Department, inasmuch as I do not believe there would be a corresponding defense expense. The second method uses a line item budget prepared by my department's budget analyst. This budget is based on his experience in law office administration which includes 20 years with the United States Army and 10 years with the Municipal Department of Law. Finally, I have set forth the cost of contracting with private firms at hourly rates which are commonly charged in Anchorage.

(1) Defense costs based on 75% of Municipal Prosecutor's budget less police support work - $700,000. (See Attachment 1)

(2) Public defense unit within municipal government with professional staff of 4 attorneys and 1 legal intern -$676,000. (See Attachment 2)

(3) Contract with private firm(s) 4 attorneys and 1 legal intern - $729,000. (See Attachment 3)

For your convenience, I will reiterate the brief historical background on this issue that I gave you over the telephone last week.

In 1975, the Greater Anchorage Area Borough and the City of Anchorage had very low level prosecution efforts directed to processing arrests within the City of Anchorage and the Spenard Police Service District. Following unification, a variety of events gave impetus to a rapid expansion of the prosecution function. First, there was the fact that the State District

Attorney's Office in Anchorage, in its attempt to cope with pipeline construction impact and its limited resources, prioritized in such a way as to leave misdemeanor prosecution largely neglected. In assessing the need for greater local effort, the Municipality sought the assistance of the Legislature in amending statutes that placed the burden of court administrative costs and public defense on local government. (The Alaska Supreme Court had previously settled the question that public defense costs is an element of court costs. See Alexander v. City of Anchorage, 490 P.2d 910; State v. City of Anchorage, 513 P.2d 1103). The Legislature responded with the adoption of Chapter 219 SLA 1976 which provided that the State would thereafter assume responsibility for certain court costs including the constitutionally mandated expense of supplying defense to indigent defendants, whether they be prosecuted under state or local codes. With that issue settled and the financial burden for the criminal justice system thus apportioned between state and local agencies - police, prosecution and corrections to be funded by local property taxes with court costs, including public defennse to be funded by the state. Following the settlement of that issue, the Municipality substantially revised its penal code in 1976 (and later its traffic code in 1978). Next, because of insufficient resources to provide adequate protection to various urban areas, the State Troopers' responsibility for law enforcement in most of Anchorage was taken over by the Anchorage Police Department. This was done by voter approved extensions of the Anchorage police service area. Extension of service to the Muldoon and Sand Lake area occurred in 1978, with Eagle River, Chugach, Ocean View and Klatt Road areas following in 1979. The voters' approval of extended services was done with knowledge of the necessity of increased taxes. In assessing the increased tax, the voters were at that time protected against assuming additional court and defense costs by the 1976 legislative solution.

The reduced emphasis in the District Attorney's Office on misdemeanor prosecution, the revision of municipal codes, as well as the expansion of police services to most of the urban areas of Anchorage necessitated a five fold increase in the professional staff of the Municipal Prosecutor's Office. At this point, the Legislature's repudiation of the 1976 action would result in one of three scenarios. First, the Anchorage Police Department could cite all offenders under state codes, placing the entire prosecution burden on the Anchorage District Attorney's Office and the entire defense burden on the State Public Defender's Office. This would result either in serious

disruption of the District Attorney's Office or in significantly reduced prosecution. Secondly, the Municipality could assume defense costs within its existing prosecution budget. This would result in reducing the total level of prosecution effort by 40% to 50%. Thirdly, the Municipal Assembly could appropriate an additional $700,000 to a defense office, leaving in tact the existing level of prosecution effort. Such additional funding would cost the Anchorage property taxpayers approximately .1 mills.

From our perspective, the first two scenarios are unacceptable because of the disruption to both the criminal justice system and the level of public safety effort demanded by local residents. The third alternative would place our local assembly as well as the public in the unenviable position of choosing between higher taxes or reduced services.

Given the disruption that would be caused by such a change in the status quo, it would appear that the reasons behind such a move be carefully and critically examined with all affected parties being given adequate time to respond. Secondly, there should be an examination of alternative solutions to any perceived problem. In this regard, the resources of my department as well as the Police Department will be made available to Representative Clocksin and his staff as necessary to fully evaluate the situation.

Very truly yours,

DEPARTMENT OF LAW

Jerry Wertzbaugher
Municipal Attorney

JW:gml
Attachments

1983 PROSECUTION BUDGET

Wages (6 attorneys, administrative officer 2 interns - 4 clerks)	502,690
Benefits	188,520
Overtime	1,150
Supplies	3,000
Communication	11,000
CLE	5,200
Repair and Maintenance	3,000
Rentals	5,100
Courts Costs	50,000
Subscription & Membership	3,000
Tuition and Registration (support staff)	500
Machinery and Equipment (Library)	1,920
Intragovernmentgal support (Administration, office space, etc.)	215,940
TOTAL:	981,120

NO INITIAL START-UP COSTS IN THIS UNIT

	981,120
	x .75%
	735,840
Less direct support to APD	35,000
	700,840

ATTACHMENT 1

PUBLIC DEFENDER UNIT
4 ATTORNEYS

Wages (4 attorneys, 2 secretaries, 1 intern, 2 clerks)	287,370
Benefits	107,770
Overtime	3,840
General Office Supplies	1,800
Initial Operating Supplies	950
Communication	880
CLE	3,200
Repair and Maintenance	2,970
Court Costs (Depositions, etc.)	25,000
Subscription and Membership	1,600
Tuition and Registration (support staff)	400
Machinery and Equipment (Furniture, word processors, library)	64,720
Intragovernmental Support (administration, office space, etc.)	150,000
Professional Services - (Outside counsel contingency and expert witnesses)	25,000
TOTAL	675,500

ATTACHMENT 2

CONTRACT ATTORNEYS

Assumptions:

4 attorneys full time at $100 per hour	640,000
1 legal intern at $40 per hour	64,000
(hourly rates include all overhead)	
Reimbursable court cost	25,000
TOTAL:	729,000

ATTACHMENT 3

STATE OF ALASKA
FISCAL NOTE

Revision Date , 1983

I. REQUEST

Bill/Resolution No.: SB255
Title: "Payment of Attorney Services"
Sponsor: Senator Kertulla
Requestor:

II. FISCAL DETAIL

Agency Affected: Dept. of Admin.
Program Category Affected: Public Defen
BRU, Program of Subprogram(s) Affected:
Third District

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		(84.3)				
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		(84.3)				
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		(84.3)				
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		(2.0)				
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Bob Stokes, Admin. Officer
Phone: 279-7541
Division: Dana Fabe, Public Defender
Date: 4/27/83

Approved by Commissioner: Commissioner Lisa Rudd
Date: 5/2/83
Department: Administartion

Distribution:
Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Preparer (if different from Author)

ANALYSIS: SB255 and HB327

Since July 1, 1976, the Public Defender Agency has been charged with the defense of indigents charged with violations of municipal ordinances. Out of necessity, the Agency has assumed this obligation using existing personnel and resources. In FY79 two additional positions were authorized in HB909, an Attorney III and a Legal Secretary I. If this bill, returning the financial obligation for indigent defense back to the municipalities should pass, these two positions would be eliminated at a savings of $84,300.

SB

257

COMMITTEE REPORT

SENATE

FURTHER:

Date: _____

Mr. President:

The Committee on _____ has had _____

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [X] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING DO PASS	MEMBERS HAVING OTHER RECOMMENDATIONS:

_____
CHAIRMAN

SB 257: ANALYSIS BY SECTION

BY MARK HIGGINS
APRIL 24, 1983

INDEX OF SECTIONS

SB 257: Analysis by Section

By Mark Higgins
April 24, 1983

I Sec. 24.60.010 LEGISLATIVE FINDINGS AND PURPOSE

Commentary: The language in this section is generally good. However, as the new chapter will apply to employees of the legislature as well as legislators, I would amend it as follows:

a) Lines 15-19 are amended to read: Legislators and legislative employees must avoid conduct that even appears to violate the trust the people have placed in them. To ensure and preserve public confidence, legislators and legislative employees should have the benefit of specific standards to guide their conduct.

b) Further Amendment: To the end of this section add the following sentence. This chapter shall be liberally construed to promote high standards of ethical conduct in the legislature."

The addition of this sentence would provide the commission and courts latitude in interpreting whether or not a situation violates the intent of the law, even if it does not specifically violate the letter of the law.

Traditionally, ethics laws are defined broadly to allow reasonable application of general principles to specific situations. This clause is designed for that purpose and has proven to be a valuable aid to the application and enforcement of ethics legislation. It is especially useful to the courts when a commission decision is appealed based on the language of the law.

II Sec. 24.60.020 APPLICABILITY

a) Sub. Sec. (b) is amended to read: {Lines 11-12}

The provisions of this chapter {specifically repeal} supercede the provisions of the common law relating to legislative conflict of . . .

b) {Lines 15-16}: {They do not...} Nothing in this chapter shall exempt any person from applicable provisions of any other laws of this state.

Commentary: It is not possible to repeal common law. In addition, this subsection, (b), is probably unnecessary as specific law always supercedes general law.

III Sec. 24.60.030 CONFLICTS OF INTEREST

a) Sub. Sec. (a) is amended to read: A person to whom this chapter applies may not use public office for private advancement or gain, or for the advancement or gain of the person's immediate family, or an organization with which the person is associated.

b) Sub. Sec. (b) is amended to read: A conflict of interest is deemed to exist (exists) when a person to whom this chapter applies has discretion to take or withhold official action or exist influence which could substantially benefit or harm a financial matter which the person, the person's immediate family, or an organization with which the person is associated with has a direct or indirect private interest.

c) Sub. Sec. (c) is repealed and replaced with: (c) A person to whom this chapter applies shall not acquire financial interests in any business or other undertaking which the person has reason to believe may be directly involved in official action to be taken by the person.

d) Sub. Sec. (d) is repealed and replaced with: (c) from the bill as written.

c) Need to add (e): (d) as bill is written.

Commentary: The proposed amendments are fairly self explanatory. The suggested added provision (c) is common to ethics legislation and is intended to prohibit self-dealing conduct such as was possibly demonstrated in the Isabelle Pass situation of last session. This clause is intended to draw a distinction between existing conflicts which, in a state with as small a population as Alaska, often can not be avoided and the intentional establishment of a conflict by a public official for the purpose of private gain.

The key phrases in this clause are "directly involved" and "official action". These should and can be carefully defined. A legislator would not as a result of this clause be prohibited from acquiring a business or financial interest which at some point in the future may be affected by the legislators vote. A vote would not constitute "direct involvement" or "official action" as intended by the clause.

However, a legislator could not, if this clause is adopted, acquire a financial interest and then as a function of his or her official position direct the state to transact with that business interest.

IV Sec. 24.60.040 CONTRACTS

Commentary: The wording of the prohibitions established in this section is good and most areas are sufficiently covered to prevent self-dealing by public officials. The requirement of open-competitive bidding on substantiative contracts should substantially enhance the public perception of legislative integrity.

Further, because of these specific guidelines, public officials will enjoy the same privileges as the general public in regard to State contracts. This is an important consideration given the part time nature of Alaska's "citizen" legislature and given the level of State involvement in the economy.

Other comments on Sec. 24.60.040:

a) Does the definition of "contract" include leases? Some states specifically reference leases as well as contracts (eg - Wisconsin).

b) Does a person have an interest "indirectly" if an immediate family member or associated organization qualifies under Subsection (A)? If not, perhaps wording should be added similar to suggested amendments to Sec. 24.60.030 (CONFLICTS OF INTEREST).

c) The definition of "an interest in a state contract" as defined in (a) is perhaps to generous. Maybe a straight 10% figure should be adopted.

Some states, like Hawaii for example, qualify restrictions on state contracts based on a "controlling interest" which is defined as: "an interest in a business or other undertaking which is sufficinet in fact to control, whether the interest be greater or less than fifty percent."

d) Sole Source Contracts: the bill as written does not include a provision allowing the State to circumvent the open-bidding requirement when it is in the best interest of the State to do so. Sole source contracting, is an important consideration in Alaska, where conditions often dictate special requirements or time limitations.

Recommended Wording: (From Hawaii Statute 84-15(a))

"A State agency shall not enter into any contract with a legislator or an employee or with a business in which a legislator or an employee has a controlling interest, involving services or property of a value in excess of $1,000 unless the contract has been awarded through an open, public process. A State agency may, however, enter into such contract without resort to a competitive

bidding process when, in the judgement of the agency, the property or services should not, in the public interest, be acquired through competitive bidding; provided that written justification for the non-competitive award of such contract shall be made a matter of public record and shall be filed with the state ethics commission at least ten days before such contract is entered into." (emphasis added).

c) Need Section on Contract Voidability:

The bill as written has no provision for voiding contracts joined in violation of this chapter. Contract voidability is an important provision and I would recommend the following wording (from: Hawaii 84-16):

"In addition to any other penality provided by law, any contract entered into by the State in violation of this chapter is voidable on behalf of the state; provided that in any action to avoid a contract pursuant to this section the interests of third parties who may be damaged thereby shall be taken into account, and the action to void the transaction is initiated within sixty days after the determination of a violation under this chapter. The Attorney General shall have the authority to enforce this provision.

V Sec. 24.60.050 STATE LOANS

There are several questions regarding this section which will be addressed in relation to the subsection they fall under.

A) Sub. Sec. (C): Requires lending agencies to send a copy of any application for loan not covered by (a) of the section to the Alaska Public Offices Commission. the APOC is to incorporate the material into the applicant's financial disclosure statement. The material may be disclosed to the ethics commission.

Commentary: This subsection raises several considerations:

1) What type of loan would not be subject to procedures outlined in (a) of this section? If there are such loans, is it desirable that state officials have access to them?

2) The bill as written states no time frame/limit within which the lending agency must submit the application to APOC. while this could probably be handled by regulation, it would be better to state it clearly in the statute.

3) Legislative employees are not required to file disclosure statements. Yet this chapter will apply to them as well as to legislators. What procedure is to be followed when they apply for a loan covered by this section?

4) APOC as receptor of loan application: A major problem relates to the assignment of APOC as receptor of the loan application. Financial disclosure statements required by AS 39.50.120 are not nearly as revealing as most loan applications. Individuals covered by this chapter would undoubtedly protest that their privacy would be jeopardized if the APOC had access to more intimate personal financial date than is currently required under present disclosure laws.

Further, records maintained by the APOC are open to public inspection. Given the requirement of confidentiality of investigation under all sections of this chapter, it would be contradictory to allow public inspection of official's loan applications, as would be the case if they were filed with the APOC.

Proposed Solution:

Given that most loans, if not all, would fall into sub category (a) of this section and realizing that any that did not should be carefully scrutinized if they involve a public official, I would recommend that the APOC not be assigned receptor of loan applications as defined in (C). The APOC has no jurisdiction in any other section of this chapter and would perform no function other than storage of the loan applications. Given the privacy issue which would be raised if the APOC is included, I would offer the following amendment to subsection (C).

Require that:

a) each loan which falls into category (C) be reviewed by the division of legislative audit before it is approved;

b) in reviewing the loan application, the division of legislative audit could request from the APOC any financial disclosure data contained in the applicant's file;

c) If after reviewing the loan application, the division of legislative audit found cause to suspect that the loan would violate the intent of the chapter, it would refer the application and all relevant documentation to the ethics commission for review;

d) The ethics commission would be required to render an opinion regarding the appropriateness of the loan within a specified time. If no opinion was rendered within the specified time, it would be deemed that the application did not violate the intent of the chapter.

If adopted, this amendment would further assure the public that legislators and legislative employees would be carefully scrutinized when applying for state funds were discretion is exercised in determining qualifications. Given the small size of Alaska's legislature and given that few loans would fall into such a "discretionary" category, the above suggested procedure would not prove unjustifiably burdensome.

B) Sub. Sec. (d): states that loan agencies shall annually publish a listing of all outstanding loans except for loans described in (a).

Question: Where do they publish the list? Shouldn't they be required to send a copy of the list to either the division of legislative audit or the ethics commission, or both?

C) Sub. Sec. (e): Given the fact that the ethics commission will be the ultimate judge of conflicts involving state loans to persons covered by this chapter, wouldn't it be advisable to require state agencies to submit a proposed regulation for commission review or approval before it is implemented. Such a procedure would ensure the establishment of adequate administrative procedures and would limit commission rulings to whether or not these procedures were followed.

D) Sub. Sec. (F): What action is to be taken by the commission if the loans are in violation of the chapter? Are they voidable? Can the state sue for recovery of funds and damages? What about innocent third parties?

VI Sec. 24.60.060 CONFIDENTIAL INFORMATION

Amend to: It is a conflict of interest if a person to whom this chapter applies discloses or uses for personal gain or for the personal gain of another person or organization, information that by law or practice is not available to the public and that the person acquired in the course of official duties.

Commentary: These amendments are fairly self-explanatory. By adding the words "or practice", the law would be substantially tightened. Such wording was strongly recommended by the executive director of Hawaii's Ethics Commission.

VII Sec. 24.60.070 INTERESTS BETWEEN PUBLIC OFFICIALS

This section as written is less restrictive than many state's statutes regarding financial dealings between public officials. But given the special conditions in Alaska, it is probably sufficient. I would, however, offer the following amendments:

1) Amend (a) to: A person to whom this chapter applies shall disclose in writing to the commission . . .

2) Amend (a)2 to: {legislators} another person to whom this chapter applies.

3) Amend (b) to: . . . involving a substantial financial matter with a lobbyist, as defined by AS 24.45.181, who is not a member of the immediate family of the person.

VIII Sec. 24.60.080 GIFTS

A) Amend (a) to: A person to whom this chapter applies may not solicit a gift in any amount, or accept or receive, directly or indirectly, a gift having an aggregate value in excess of one hundred dollars ($100) in any calendar year from any person or organization, whether in the form of money, services, a loan, travel, entertainment, hospitality, promise, or other form, under circumstances in which it may reasonably be inferred that the gift is intended to influence the person in the performance of the duties of the person or is intended as a reward for an official action ,or inaction, by the person.

Commentary: This amendment would prevent a person or organization from giving an official several gifts, each of an individual value less than $100, but with a combined value in excess of $100.

B) Amend Sub. Sec. (b), to read: hospitality from another person at {another} that person's residence, including meals, lodging or ground or water transportation;

Commentary: This amendment would tighten the wording of this clause and would prevent a person or organization from skirting the intent of the gift provision by offering an official "hospitality" at a commercial lodge or guide service, etc.

For example, if this subsection is adopted as written, a person or organization could pay for a public officials trip or stay ("hospitality") at a commercial lodge, if the owner of the lodge ("another person") resided there, even though the person or organization funding the trip had no association with the residence. This amendment would prevent that.

C) Amend (b)[3] to read: an invitation to attend a meal or social event that does not exceed $100 in value received by the person for each meal or event and that does not in the aggregate exceed $250 in value during the calendar year form one person or organization; or

D) Sub. Sec. needed: (d) No person or organization may offer or give to a public official to whom this chapter applies, directly or indirectly, any gift which the public official is prohibited from accepting pursuant to subsection (a) of this section.

Commentary: The addition of this clause, which is contained in many state's gift provisions, would make the giver or offerer of an illegal gift equally liable with the official who accepts it.

VIX Sec. 24.60.090 NEPOTISM

Question: What is the definition of "a permanent member of the legislators household"? Is this legally definable?

Most states are grapling with the problem of how to include "live-in lovers" in their laws. But will this clause accomplish that adequately? Would renters be considered "permanent members"?

X Sec. 24.60.100 REPRESENTATION BY LEGISLATORS

Amend subsection (a) to read: Except as provided in this section, a member of the legislature or a person employed by an agency of the legislature established under AS 24.20 may not represent another person or organization for compensation before an agency, board, or commission of the State.

Commentary on sub. sec. (b):

1) How does sub. sec. (b) interface with AS 39.50.090(C)? Are they mutually compatible?

2) Are Alaskan courts considered State agencies? If not, then (b) is unnecessary, as the usual rule in ethics legislation is that courts are not generally considered to be agencies of the State. Consequently, this section would implicitly not have representation before a court by a person covered by this chapter.

3) Subsection needed? (d) This section does not apply to representation by a person covered by this chapter if that person is acting in his or her official capacity.

XI Sec. 24.60.110 ACTION ON A CONFLICT OF INTEREST

Commentary: This section seems unusually brief and fails to address employees of the legislature who are faced with a conflict of interest. As this section is extremely important to the chapter, I would recommend that it be re-written as follows:

a) A person covered by this chapter, who in the discharge of official duties, is involved or about to be involved in any matter that could result in a conflict of interests on his or her part shall:

1) Divest the interest that has resulted in the conflict or potential conflict; or

2) Prepare a written statement describing such matter and the nature of the possible conflict of interest and

a) in the case of a legislator, deliver copies of the statement to the commission and the presiding officer of the appropriate body of the legislature, who shall cause such statement to be printed in the journal of the appropriate body or if the legislature is not in session, shall request that the commission maintain a public record of such statement which shall subsequently be included in the journal for the first day of the following session. Upon request of the legislator, the presiding officer of the appropriate body, shall excuse the legislator from votes, deliberations and other actions in regard to such matter; or

b) in the case of an employee of the legislature covered by this chapter, deliver a copy of the statement to the commission and to his or her immediate superior, if any, who shall assign the matter to another, or if the employee has no immediate superior, he or she shall take such steps as the commission shall prescribe or advise to remove himself or herself from influence over actions and decisions on the matter.

XII Sec. 24.60.120 STATE PROPERTY AND FUNDS

Amend to read: A person to whom this chapter applies may not use state property or funds for private gain or for the gain of others or for campaign purposes.

XIII Sec. 24.60.130 LEGISLATIVE ETHICS COMMISSION

Commentary: This section looks pretty good. A few questions:

A) Sub. Sec. (e) states: "A commission member may not serve more than one full term." Does this mean four years, or a term "unit"? In other words, could someone who was appointed to fill a vacancy, serve the remainder of the term of the person who's vacancy they were filling, plus another full term, or could they just serve for the remainder of the term?

B) There is no provision for staggering the terms of the initial appointees to the commission. Such a practice is common when forming a commission and is intended to provide continuity on the commission and also prevent any one member from dominating the commission for a long periods of time.

Recommended Wording: e) the term of office of a public member of the commission is five {four} years from February 1 of the year of appointment and until a successor is appointed and qualifies, except that the members first appointed shall be appointed for terms of office of one, two, three, four, and five years, respectively, and until their successors have been appointed and have qualified.

I suggested increasing the term of service to five years so that no commission member's term of office would coincide with a legislator who appointed him or her, as could be the case with Senate approval and a four year term.

XIV Sec. 24.60.140 DUTIES OF THE COMMISSION

No comments other than that I would recommend that the commission be required to publish annual rather than semi-annual summaries of its decisions and opinions. Annual publications would be consistent with most states and would reduce the bureaucratic requirements of the commission.

XV Sec. 24.60.150 ADVISORY OPINIONS

Amend to read: {Lines 19-20} The opinion issued or considered issued, until amended or revoked, is binding on the commission and in any . . .

Commentary: This amendment would allow the commission to change or revise a decision if facts are brought to light, which in good faith were not known at the issuance or non-issuance of the opinion.

XVI Sec. 24.60.160 COMPLAINTS

Questions:

1) How long will evidence be maintained?

2) Should not the evidence gathered be available to the Attorney General as well as staff and the commission in the event a referal is recommended?

3) Is a referal to the Attorney General possible, desirable for legislators who violate this chapter? employees of the legislature?

XVII Sec. 24.60.170 DEFINITIONS

Commentary: The definitions sections is an essential component of any ethics statute, both for citizen comprehension and court interpretation. This bill's definition section is grossly inadequate.

The following terms need to be defined:

"official action", "relatively insignificant", "relatively far removed", "close economic association", "substantial financial matters", "campaign purposes", "competent and substantial evidence", "state agency", and "organization" (if suggested amendments are adopted).

XVIII OTHER SECTIONS NOT INCLUDED WHICH COULD BE CONSIDERED

1) Joint and Several Liability: eg - "If two or more persons are responsible for any violation, they shall be jointly and severally liable." (Calif. statute).

2) Referal to the AG: eg - "The commission shall refer to the Attorney General violations of the law which in its opinion merit prosecution. The Attorney General shall have responsibility for all prosecutions under the law and may request from the commission all evidence collected in its investigation."

3) Severability of Chapter: eg - "If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more if its applications, the part remains in effect in all valid applications that are severable from the valid applications."

4) Honorariums and Fees Section

M. Matthew Higgins

WK Copy

BY THE RULES COMMITTEE
BY REQUEST OF THE
SPECIAL COMMITTEE
ON LEGISLATIVE REFORM

IN THE SENATE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

For an Act entitled: "An Act relating to standards of conduct of legislators and legislative employees and establishing a Legislative Ethics Commission; and providing for an effective date."

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 24 is amended by adding a new chapter to read:

CHAPTER 60. STANDARDS OF CONDUCT.

NO problem Sec. 24.60.010. LEGISLATIVE FINDINGS AND PURPOSE. The legislature finds that it is essential in the conduct of public business that legislators hold the respect and confidence of the people. Legislators must avoid conduct that even appears to violate the trust the people have placed in them. To ensure and preserve public confidence, legislators should have the benefit of specific standards to guide their conduct. Article II, sec. 12, Constitution of the State of Alaska grants to each house of the legislature the power to judge the qualifications of its members. It is the purpose of this Act to establish standards of conduct for state legislators and legislative employees and to establish the Legislative Ethics Commission to consider alleged violations of this chapter and to render advisory opinions to persons affected by this chapter.

Sec. 24.60.020. APPLICABILITY. (a) This chapter applies to a member of the legislature, to a person employed by a member of the legislature Legislative Aides, and to a permanent or temporary employee of an agency of the legislature. This chapter does not apply to

(1) a former member of the legislature or to a person

formerly employed by a member of the legislature or an agency of the legislature unless the provision specifically states that it so applies;

(2) a person elected to the legislature who at the time of election is not a member of the legislature.

(b) The provisions of this chapter specifically repeal the provisions of the common law relating to legislative conflict of interest that may apply to a member of the legislature, a legislative employee, a person employed by a member of the legislature, or to a permanent or temporary employee or an agency of the legislature. They do not supersede or repeal provisions of the criminal laws of the state.

Sec. 24.60.030. CONFLICTS OF INTEREST. (a) A person to whom this chapter applies may not use public office for private advancement or gain.

(b) A conflict of interest exists when a person to whom this chapter applies takes or withholds official action or exerts influence which could substantially benefit or harm a financial matter in which the person has a direct or indirect private interest.

(c) Conflicts of interest are prohibited but there is not a conflict of interest if, as to a specific matter, there is no substantial impropriety or appearance of impropriety because

(Judge mont calls)

(1) the person's interest is relatively insignificant;

(2) the person's authority is relatively far removed from any official action that could reasonably be affected by the potential conflict of interest, provided that no attempt has been made to remove the appearance of impropriety by delegating responsibility for official action.

(d) A conflict exists if benefits accrue to a person to whom this chapter applies beyond that which may accrue uniformly to members

of the profession, occupation or group to which the person belongs, or to the public at large.

Sec. 24.60.040. CONTRACTS. (a) A person to whom this chapter applies may not be a party to or have an interest in a state contract unless the contract is let by competitive bidding under AS 37.05.230 or the total annual amount of the state contract is $1000 or less. A person has an interest in a state contract under this section if the person receives direct or indirect financial benefits. A person has an interest in a state contract under this section if the contract is awarded to (RAY NO Sole source for legislature.)

(1) a firm, corporation, or association that has assets in excess of $5,000,000 and in which the person has an ownership interest greater than 10 percent or that has assets of $5,000,000 or less and in which the person has an ownership interest greater than 25 percent; or

(2) a partnership in which the person is a partner.

(b) In this section, "direct or indirect financial benefits" means income, profits or other financial benefits under a state contract, without regard to whether the income, profits or other financial benefits inure to the person as a partner, shareholder, investor, agent, employee, consultant, or joint venturer of the contractor.

Sec. 24.60.050. STATE LOANS. (a) It is not a conflict of interest for a person to whom this chapter applies to participate in a state program or to receive a loan from the state if the program or loan is generally available to members of the public, is subject to fixed eligibility standards, and minimal discretion is exercised in determining qualification.

(b) In determining whether a conflict of interest exists with

respect to a state program or to a state loan other than those described in (a) of this section, because a legislator may be in a position to influence the loan agency, the ethics commission must consider, but is not limited to, the adequacy of existing administrative procedures for granting and reviewing loans to legislators.

(c) Upon application for a state loan by a person to whom this chapter applies, other than loans described in (a) of this section, the lending agency must send a copy of the application to the Alaska Public Offices Commission, which will incorporate the material into the applicant's financial disclosure statement, if the applicant is required to file a disclosure statement. All records relating to a state loan to a person to whom this chapter applies must be disclosed to the commission upon request.

(d) Each February 1st, each loan agency must publish a listing of all outstanding loans to persons to whom this chapter applies, except for loans described in (a) of this section. The list must include the name of the person, the date of issuance and current status of the loan.

(e) State agencies that have authority to grant loans shall adopt regulations that establish separate procedures for granting and reviewing loans to a person to whom this chapter applies. However, the regulations need not govern loans described in (a) of this section.

(f) The division of legislative audit shall annually review state loans granted to or held by persons to whom this chapter applies to determine whether appropriate procedures were observed in granting or reviewing the loans. The division shall report its findings to the ethics commission by April 1.

(g) For purposes of this section "state program" means a program

in which tangible assets of the state or a right to use tangible assets of the state are transferred from the state to a private person.

Insert

Sec. 24.60.060. CONFIDENTIAL INFORMATION. It is a conflict of interest if a person to whom this chapter applies willfully discloses, or knowingly uses, for personal gain or for the personal gain of another, information that by law is not available to the public and that the person acquired in the course of official duties.

ok

Sec. 24.60.070. INTERESTS BETWEEN PUBLIC OFFICIALS. (a) A person to whom this chapter applies shall disclose to the commission the formation or maintenance of a close economic association involving a substantial financial matter with

Insert Immediate family member.

(1) a supervisor who has responsibility or authority, either directly or indirectly, over the person's employment, including preparing or reviewing performance evaluations, or granting or approving pay raises or promotions;

(2) legislators;

(3) a public official in another branch, if the public official is required to file a financial disclosure statement under AS 39.50. (4) Registered A LOBBIST

(Delete) (b) It is a prohibited conflict of interest for a person to whom this chapter applies to form or maintain a close economic association involving a substantial financial matter with a lobbyist who is not a member of the immediate family of the person.

Sec. 24.60.080. GIFTS. (a) A person to whom this chapter applies may not solicit a gift in any amount, or accept or receive, directly or indirectly, whether in the form of money, services, a loan, travel, entertainment, hospitality, or other form, under circumstances in which it may reasonably be inferred that the gift

influenced the person in the performance of the duties of the person or was intended as a reward for an official action by the person.

(b) It is not a conflict of interest under this section if a person to whom this chapter applies accepts

(1) hospitality at another person's residence within the state, including meals, lodging or ground or water transportation;

(2) discounts that are generally available to the public or a large class of persons to which the person belongs;

(3) an invitation to attend a meal or social event that does not exceed $100 in value received by the person for each meal or event; or

(4) gifts from the person's immediate family.

(c) The commission may establish additional policies that limit the extent to which persons to whom this chapter applies may accept the benefits set out in this section.

Sec. 24.60.090. NEPOTISM. (a) An individual who is related to a member of the legislature may not be employed in the house in which the legislator is a member, by an agency of the legislature established under AS 24.20, or in the other house during the interim between sessions. An individual who is related to an employee of the legislature may not be employed in a position over which the employee has supervisory authority. In this subsection, "an individual who is related to" means a child, husband, wife, mother, father, sister, brother, or permanent member of the legislator's household.

(b) A member of the legislature may represent a client in

(1) an action before a court of the state; or

(2) a matter which was pending at the time a person to whom this chapter applies assumes office or is employed.

(c) A legislator cannot avoid a conflict of interest under this

section by waiving compensation for representing another person under circumstances where compensation would ordinarily be expected.

Sec. 24.60.110. ACTION ON A CONFLICT OF INTEREST. A legislator who knowingly has, or has been notified of a conflict of interest, shall immediately

(1) resign the conflicting position;

(2) divest the interest that has resulted in the conflict or potential conflict; or

(3) disclose the conflict of interest in the journal of the appropriate body or if the legislature is not in session to the commission which shall maintain a public record of the disclosure and forward the disclosure to the respective house for inclusion in the journal for the first day of the session.

Sec. 24.60.120. STATE PROPERTY AND FUNDS. A person to whom this chapter applies may not use state property or funds for private gain.

Sec. 24.60.130. LEGISLATIVE ETHICS COMMISSION. (a) There is established within the legislative branch of the state government the Legislative Ethics Commission.

(b) The senate commission consists of five members and the house commission consists of seven members to be appointed as follows:

(1) the president of the senate shall appoint three members to the commission from the senate with the concurrence by roll call vote of three-fourths of the full membership of the senate;

(2) the speaker of the house of representatives shall appoint five members to the commission from the house of representatives with the concurrence by roll call vote of three-fourths of the full membership of the house;

(3) the commissioner of administration and the commissioner of public safety or their designees shall serve as ex-officio members

on both the senate and house commissions;

(4) The attorney general or his designee shall also serve as an ex-officio member and provide such legal aid and assistance as may be requested.

(c) No more than two members of the legislative members of the senate commission, or three legislative members of the house commission may be members of the same political party.

(d) The members of the commission shall elect a chair and vice-chair and may elect other officers.

(e) A vacancy on the commission shall be filled under (b) of this section for the balance of the term.

(f) The commission may contract for professional services and may employ staff as it considers necessary.

(g) A member of the commission receives no compensation for service on the commission. Members of the commission are entitled to travel expenses and per diem authorized by law for members of boards and commissions under AS 39.20.180.

Sec. 24.60.140. DUTIES OF THE COMMISSION. The commission shall

(1) adopt regulations to facilitate the receipt of inquiries and prompt rendition of its opinions;

(2) recommend legislation to the legislature the commission considers desirable or necessary to promote and maintain high standards of ethical conduct in government;

(3) subpoena witnesses, administer oaths, and take testimony relating to matters before the commission, and may require the production for examination of any books or papers relating to any matter under investigation before the commission;

(4) publish semi-annual summaries of decisions, advisory opinions and informal advisory opinions, with sufficient deletions in

the summaries to prevent disclosing the identity of the persons involved in the decisions or opinions which have remained confidential.

Sec. 24.60.150. ADVISORY OPINIONS. The commission shall issue an advisory opinion on the request of a person to whom the chapter applies as to whether the facts and circumstances of a particular case constitute a violation of ethical standards. If an advisory opinion is not issued within 30 days after the request is filed with the commission, the facts and circumstances of the particular case do not constitute a violation of the ethical standards. The opinion issued or considered issued is binding on the commission and in any subsequent proceedings concerning the facts and circumstances of the particular case unless material facts were omitted or misstated in the request for the advisory opinion. Except as provided in this chapter an advisory opinion is confidential but may be made public if a written request by the person who requested the opinion is filed with the commission.

Sec. 24.60.160. COMPLAINTS. (a) The commission may initiate, receive and consider complaints alleging a violation of this chapter.

(b) Before the commission may exercise power authorized in (c) of this section, the commission shall be resolution, supported by a vote of a majority of a commission, define the nature and scope of the inquiry.

(c) The commission may investigate a violation of this chapter in a proceeding begun within four years after the alleged violation occurs and within one year after termination of state service. Nothing in this subsection bars proceedings against a person who by fraud prevents discovery of a violation of this chapter. A proceeding is commenced by the filing of a complaint with the commission. No

complaint, other than a complaint initiated by a majority of the members of a commission may be received within a period of 60 days preceding a state primary or general election.

(d) A complaint shall be in writing and signed under oath by the person making the complaint. A complaint may also be initiated by a majority of the members of a commission. The commission shall notify in writing each person against whom a complaint is received and afford the person an opportunity to explain the conduct alleged to be a violation of this chapter. If the commission determines that a complaint does not contain allegations of acts sufficient, if the alleged facts are treated as true, to constitute a violation of this chapter a commission shall summarily dismiss the complaint.

(e) A commission shall investigate the charges filed under this section and issue an advisory opinion to the person alleged to have violated a provision of this chapter. A commission shall investigate all complaints on a confidential basis. If the advisory opinion indicates a probable violation, the person against whom the complaint was made may request a formal opinion or comply with the advisory opinion. If the person fails to comply with the advisory opinion or if a majority of the members of a commission determine that there is probable cause for belief that a violation of this chapter has occurred, a commission shall file a complaint against the person charged with a violation of this chapter and the complaint and statement of the alleged violation shall be personally served on the person charged. The alleged violator has 20 days after service of the complaint and statement to respond in writing to a commission.

(f) A commission may set a time and place for a hearing with notice to the complainant, if any, and to the person charged with a violation of this chapter. A representative of a commission and the

person charged with a violation of this chapter shall have an opportunity to be heard, to subpoena witnesses and require the production of books or papers relating to the proceedings, to be represented by counsel, and to have the right of cross-examination. Each witness shall testify under oath. The hearings are closed to the public unless the person charged with a violation of this chapter requests an open hearing. A commission is not bound by the rules of evidence but a commission's findings must be based upon competent and substantial evidence. The testimony taken at the hearing shall be recorded and evidence shall be maintained. The testimony and evidence is available only to the staff of a commission and to the person charged with a violation of this chapter. If the person charged with the violation of a provision of this chapter requests a copy of the transcript of testimony, the copy shall be furnished by a commission without charge.

(g) A decision of a commission shall be in writing and signed by a majority of the members of a commission. Each decision of a commission must be accompanied by a written order of the commission determining that a violation of this chapter exists or does not exist. The order is confined to this determination. This order is a public record.

(h) If a commission issues a decision that a member of the legislature has violated a provision of this chapter or that a legislator has declined or failed to cooperate with the commission, it shall refer the decision to the presiding officers of the legislature. The decision shall contain a statement of the facts determined to constitute the violation or the failure to cooperate and may contain recommendations concerning any penalties the legislature may lawfully impose including imposition of civil penalties in an amount not to exceed $25,000, divestment of the interest, repaying profits, censure,

removal from committee assignments, termination of legislative privileges, or expulsion. The commission shall make the decision public 30 days after the referral. Days during which the legislature is not in session may not be counted in determining the 30-day period. The legislature shall act on the decision as it considers appropriate.

(i) If a majority of the members of a commission agree to a decision that a former member of the legislature or an employee or a former employee of a legislator or of an agency of the legislature has violated a provision of this chapter, the commission shall issue a public statement of its decision 30 days after the date of the decision. The legislature shall act on the decision as it considers appropriate. In the case of an employee the action may include suspension, demotion, or dismissal.

(j) A commission member or individual who divulges information concerning a charge before the filing of a complaint by the commission, except as permitted by this chapter, is guilty of misuse of confidential information under AS 11.56.860.

Sec. 24.60.170. DEFINITION. In this chapter, "commission" means the Legislative Ethics Commission of each house of the legislature.

* Sec. 2. Section 24.60.130 and Sec. 24.60.140 enacted in sec. 1 of this Act take effect immediately in accordance with AS 01.10.070(c).

SUMMARY OF CHANGES MADE IN SENATOR RAY'S PROPOSED COMMITTEE SUBSTITUTE FOR SB 257

Sec. 24.60.030(b) was changed as follows:

> A conflict of interest exists when a person to whom this chapter applies (HAS DISCRETION TO TAKE OR WITHOLD) takes or witholds official action or exerts influence which could substantially benefit or harm a financial matter in which the person has a direct or indirect private interest.

The purpose of the change is to make sure that only the actual taking or witholding of official action, or exertion of influence, constitutes a conflict of interest. Merely having discretion to do so should not suffice.

Sec. 24.60.030(d) was changed as follows:

> A conflict (DOES NOT EXIST) exists if (NO) benefits (OR DETRIMENT) accrue(S) to a person to whom this chapter applies beyond that which (ACCRUES) may accrue uniformly to members of the profession, occupation or group to which the person belongs, or to the public at large.

The purpose of this change is to clarify the meaning of the subsection. Again, the basic intent is to only include the actual, rather than the potential, accrual of benefits within the definition of conflict of interest.

Sec. 24.60.040(b) was changed as follows:

> In this section, "direct or indirect financial benefits" means income, profits or other financial benefits under a state contract, (WITHOUT REGARD TO WHETHER THE PERSON IS A PARTY TO THE CONTRACT, AND) without regard to whether the income profits or other financial benefits (ENSUE) inure to the person as a partner, agent, employee, consultant, or joint venturer of the contractor.

The purpose of this change is _____

_____

_____

_____

Sec. 24.60.060 was changed as follows:

> It is a conflict of interest if a person to whom this chapter applies willfully discloses or knowingly uses for personal gain or for the personal gain of another, information that by law is not available to the public and that the person acquired in the course of official duties.

The purspose of this section is to make sure that inadvertant disclosure or use of "confidential" information does not constitute a conflict. This would apply, for example, to a situation where while discussing a topic of interest with a

constituent, a legislator inadvertantly discloses information which may be construed as being "confidential."

Sec. 24.60.080(a) was changed as follows:

> A person to whom this chapter applies may not solicit a gift in any amount, or accept or receive, directly or indirectly, (A GIFT IN EXCESS OF $100,) whether in the form of money, services, a loan, travel, entertainment, hospitality, or other form, under circumstances in which it may reasonably be inferred that the gift (IS INTENDED TO INFLUENCE) influenced the person in the performance of the duties of the person or (IS) was intended as a reward for an official action by the person.

The purpose of this change is to: (1) eliminate the $100 minimum requirement for the solicitation of gifts; and (2) only prohibit the actual influencing of a person, rather than to make the intent of the person giving the gift controlling.

Sec. 24.60.080(b) was changed as follows:

> It is not a conflict of interest under this section if a person to whom this chapter applies accepts
>
> (1) hospitality at another person's residence within the state, including meals, lodging or ground or water transportation;
>
> (2) discounts that are generally available to the public or a large class of persons to which the person belongs;
>
> (3) an invitation to attend a meal or social event that does not exceed $100 in value received by the person for each meal or event (AND THAT DOES NOT IN THE AGGRAGATE EXCEED $250 IN VALUE DURING THE CALENDAR YEAR FROM ONE PERSON); or
>
> (4) gifts from the person's immediate family.

The purpose of this change is to: (1) not expressly exempt the acceptance of hospitality at another's out of state residence as a conflict; and (2) eliminate the aggragate $250 per calender year requirement for meals and social events which would be highly impractical, if not impossible, to keep an accurate accounting of.

Sec. 24.60.080(c) was changed as follows:

> The commission may establish additional policies that limit the extent to which persons to whom this chapter applies may accept the benefits set out in ((B)(2) OF) this section (,OR THAT REQUIRE PUBLIC OFFICIALS TO TURN OVER THE BENEFITS TO THE AGENCY).

The purpose of this change is to: (1) clarify that the policies the commission is authorized to establish are additional; (2) clarify or authorize that the commission can establish such additional policies in regard to all parts of 24.60.080 dealing with gifts; and (3) eliminate the "Amigo fare" language about requiring public officials to turn over benefits to the agency because said language is superflous and confusing.

Sec. 24.60.090 was changed by deleting the entire subsection (b), which read as follows:

> (AN INDIVIDUAL IS NOT EMPLOYED IF NO COMPENSATION IS RECEIVED FROM THE STATE FOR THE SERVICES PROVIDED.)

The purpose of this change is to include the voluntary services of related persons within the prohibition against nepotism.

Sec. 24.60.100 was changed by deleting the entire subsection (a)--It should be noted, however, that Sen. Ray's proposed CS inadvertantly failed to include the number or title of this section and also failed to change the lettering of the 2 remaining subsections, which should be listed as subsections (a) and (b).

The purpose of this change is to only specify what types of action a member of the legislature can represent a client in and to provide that performing prohibited services for free will not avoid a conflict.

Sec. 24.60.110 was changed, in pertinent part, as follows:

> A legislator who knowingly has, or has been notified of a conflict of interest, shall immediately
>
> (1) resign the conflicting position;
>
> ...

The purpose of this change is to: (1) make sure that the section only applies to actual conflicts of which the person is aware; and (2) specify and clarify that the person will only be required to resign the conflicting position.

Sec. 24.60.120 was changed as follows:

> A person to whom this chapter applies may not use state property or funds for private gain (OR CAMPAIGN PURPOSES).

This change is self-explanatory.

Sec. 24.60.130 was changed by completely revising the entire section dealing with the composition, functions, powers, etc. of the Legislative Ethics Commission. A detailed analysis of these changes, and the reasons therefor, is beyond the scope of this summary.

> It should also be noted that the changes made in this section, especially the creation of two separate commissions instead of one, necessitated grammatical changes, such as the use of the word "a" instead of "the," in subsequent sections. These grammatical changes, when not accompanied by substantive ones, will not be included in this summary.

Sec. 24.60.150 was changed by deleting the following language in the last sentence of said section:

> Except as provided in this chapter an advisory opinion is confidential (BUT MAY BE MADE PUBLIC IF A WRITTEN REQUEST BY THE PERSON WHO REQUESTED THE OPINION IS FILED WITH THE COMMISSION).

This change is self-explanatory.

Secs. 24.60.160 and 24.60.170 contain non-substantive changes necessitated by the rewriting of the section dealing with the composition, function, etc. of the Legislative Ethics Commission.

ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

LABOR AND COMMERCE COMMITTEE, CHAIRMAN
RESOURCES COMMITTEE
JUDICIARY COMMITTEE
FISHERIES SUB-COMMITTEE

P.O. BOX 113
SITKA, ALASKA 99835

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4916

MEMORANDUM

TO: Sen. Bill Ray, Chair
Senate Judiciary Committee

FROM: Mary Levan, P.A. to Sen. Eliason

DATE: May 4, 1983

RE: SB 257, Legislative Standards of Conduct

Sen. Eliason is out of town on legislative business this week, and will be unable to attend today's committee hearing on SB 257. He has a copy of the State Affairs CS for SB 257 with him which he has been reviewing. Yesterday he called his office and asked that we relay to your committee his concern that the State Affairs CS has overlooked an area that ought to be addressed.

Sen. Eliason's concern is with the subject of political fundraisers held during the legislative session. In light of the statement of findings in SB 257 which states the importance of avoiding conduct that even appears to violate the public trust, Sen. Eliason feels that fundraisers, particularly those to raise funds for individual legislators' campaigns, need to be dealt with in this bill. He wanted this matter brought to the committee's attention, and hopes that the Judiciary Committee will consider it in their deliberations on the measure.

SB

286

FILE WITH SB (LEMON LAW)
286

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION SECTION

1031 W. FOURTH AVENUE
SUITE 110
ANCHORAGE, ALASKA 99501
PHONE: (907) 279-0428

May 13, 1983

Representative Walt Furnace, Chairperson
House Labor and Commerce
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: HB 344

Honorable Representative Furnace:

Thank you for the chance to testify at the committee's recent hearing and later teleconference on House Bill 344. I have reviewed our files and from that information, and some additional sources, prepared the consumer complaint analysis you requested. I apologize for the delay in supplying this information as other pressing duties interfered.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By Scotty Dawkins

Scotty Dawkins
Investigator
Consumer Protection Section

/and

Enclosure

cc: Ron Lorenson
Deputy Attorney General

All members of House Labor
& Commerce Committee

Rep. Mike Miller and
all Bill Sponsors

Senator Bill Ray

May 1983

DEPARTMENT OF LAW -- CONSUMER PROTECTION SECTION

AUTOMOTIVE WARRANTY COMPLAINTS

A Note on Complaint Statistics: A total of 133 auto warranty complaints were formally filed with Consumer Protection from January 1981 to April 1983. This figure, although significant, does not necessarily reflect the total number of warranty problems in Alaska.

A study by T.A.R.P. Inc., a Washington D.C. based research firm, revealed that 96 percent (96%) of consumers with a complaint never even tell the business of the problem, much less complain to a government agency. The Consumer Protection Section's experience over a ten year period is that for each consumer who complains, there are probably five or more additional consumers in a similar situation. Many Alaskans do not file a complaint with Consumer Protection because: they don't know we exist, they are distant from our offices, or our limited ability to negotiate voluntary settlements may not satisfy their needs. National automobile industry complaint statistics show that three percent (3%) of all new car buyers feel they were sold a defective vehicle and are frustrated in their attempts to have the defects corrected. If this three percent number holds true in Alaska (and indeed it might be higher) last year alone 846 Alaskans purchased defective vehicles that may meet the criteria established in HB 344.

AN ANALYSIS OF AUTO WARRANTY COMPLAINTS

January 1981 - April 1983

TOTAL NUMBER WARRANTY COMPLAINTS 133

REGIONAL BREAKDOWN:	Number	Percentage
South Central/Anchorage	101	76%
Interior/Fairbanks	14	10%
Southeast/Juneau	18	14%

COMPLAINTS BY PRIMARY ALLEGATIONS:

Multiple Repairs to Same Defect	28	22%
Unreasonable Delay in Repairs	17	14%
Multiple Defects	27	20%
Safety Related Defect	13	10%
Complaint Involves Defect Under Federal Investigation (FTC, NHTSA, EPA. ect.)	12	9%
Paint, Water Leak	7	6%
Miscellaneous	10	8%

Total Complaints 133

DISPOSITION OF WARRANTY COMPLAINTS:	Number	Percentage
Mediated to Consumer's Satisfaction ....TOTAL:	73	55%
Repairs Completed	38	29%
Repair Costs Refunded	10	8%
Repair Cost Split between Factory and Consumer	8	6%
Manufacturer Supplied Parts but not Labor	5	4%
Manufacturer or Dealer Bought Car Back	5	4%
Miscellaneous	7	5%
	(73)	(55%)
Not Mediated to Consumer's Satisfaction.TOTAL:	48	36%
Because Manufacturer's Response Was:		
Warranty Expired	10	8%
Not Covered by Terms of Warranty	8	6%
Consumer Unable to Return Vehicle to Dealership, So Repairs Denied	2	2%
Factory Refused to Authorize Repairs	4	3%
Owner Abuse/Lack of Maintenance	3	2%
Consumer Refused to Return to Dealership: (Lost Confidence After Dealer's Attempts to Repair).	3	2%
Refused Consumer's Buy Back Request	8	6%
Miscellaneous	10	8%
	(48)	(36%)
WARRANTY COMPLAINTS NOW PENDING: .....TOTAL:	12	9%
Anchorage	8	6%
Fairbanks	2	2%
Juneau	2	2%

ECONOMIC IMPACT ON CONSUMERS

The owner of a defective vehicle suffers real economic harm, measured in: (1) hours/days of lost work, (2) cost of substitute transportation, and (3) after the warranty expires, cost of numerous repairs due to aftereffects of the defect.

Also, the economic life and value of a defective vehicle is seriously lessened, and this economic truth is recognized by the automobile industry itself. The following example is taken from the June 1983 "Blue Book," a widely used guide to used car values. Calculation of the Blue Book resale price of a 1982 Cadillac includes a deduction of $1,335. because the vehicle is equipped with a diesel engine which has become nationally recognized as seriously defective. This sharp decrease in value, in comparison to a non-diesel version of the same Cadillac, is made despite the fact that this particular diesel engine had cost the owner $925. extra at the time of purchase. Thus, the owner of the defective diesel vehicle can be said to have suffered an economic loss of $2,460. in the value of his/her defective vehicle in comparison to the owner of a similar Cadillac without the defect.